FILED

(1)

No. 96 451 SEP 23 1996

In The OFFICE OF THE CLERK

SUPREME COURT of the United States

October Term, 1996

NORTH MICHIGAN LAND & OIL CORPORATION; NIELSON ENTERPRISES CORPORATION; NIELSON ENTERPRISES, a Limited Partnership; NORTH MICHIGAN GAS & OIL, a Limited Partnership; DAVID E. NIELSON; DALE M. NIELSON; GERALD J. TALBOT; and CMK ENTERPRISES, INC.,

Petitioners,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS POWER COMPANY, and FRANK J. KELLY, as Attorney General for the State of Michigan.

Respondents.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

J. ANDREW DOMAGALSKI
JEFFREY D. VANLEUWEN
Attorneys for Petitioners
8992 East D Ave., Box 366
Richland, MI 49083
(616) 629-9791

and

BYRON P. GALLAGHER
Attorney for Petitioners
555 N. Main St., Box 446
Mt. Pleasant, MI 48858
(517) 773-9961

154 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent, the Michigan Public Service Commission ("MPSC"), at the request of Respondent, Consumers Power Company ("Consumers"), purporting to act under the authority of 1929 PA 9 ("Act 9") [MCLA §483.101, et seq.; MSA §22.1311, et seq.], substantially reduced the price payable to Petitioners under a certain Gas Purchase Contract, as amended, entered into between Petitioners and Respondent, Consumers. The price reduction was accomplished pursuant to an application filed by Respondent Consumers with the MPSC, in MPSC Case No. U-10029. Petitioners contend that the entire procedure resulted in a denial of Petitioners' constitutional rights and that Act 9, both as applied by the MPSC and on its face, deprives Petitioners of their constitutional rights.

I. Did the MPSC and Michigan Court of Appeals err in determining that granting the relief requested by Consumers in MPSC Case No. U-10029 would not violate the constitutional rights of Appellants and that Section 10 of Act 9 is not unconstitutional, either on its face or as applied by the MPSC and Michigan Court of Appeals.

PARTIES TO THE PROCEEDING

The caption of the case contained on the cover sheet to this Petition contains the name of all parties to the proceedings in this Court. There are no parent companies or non-wholly owned subsidiaries of corporate Petitioners, North Michigan Land & Oil Corporation, Nielson Enterprises Corporation, or CMK Enterprises, Inc.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions, Treaties Statutes, Ordinances, Rules and Regulations Involved	2
Statement of the Case	2
Reasons For Granting The Writ	11
I. The MPSC and Michigan Court of Appeals Erred In Determining That Granting The Relief Requested By Consumers Would Not Violate The Constitutional Rights of Petitioners and That Section 10 Of Act 9 Was Not Unconstitutional Both On Its Face and As Applied In This Case	12
Conclusion	25

TABLE OF AUTHORITIES
(cases, etc.)

Page

Cases

211 Mich App 424; 536 NW2d 259 (1995) . 1

Blue Cross and Blue Shield of Michigan v Governor, 422 Mich 1; 367 NW2d 1 (1985) 18

Board of Regents v Roth, 408 US 564, 577, 33 L. Ed. 2d 548, 92 S Ct 2701 (1972) 21

Brown v Smith, 225 SW2d 91 (Tenn. App. 1949) 21

Consolidation Coal Co v Department of Treasury, 141 Mich App 483; 366 NW2d 587 (1985) 24

Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32; 102 S.Ct. 38, 42; 70 L.Ed. 2d 23 (1981) 17

Galembiowski v Madison Heights Civil Service Commission, 93 Mich App 137, 153; 286 NW2d 69, 85 (1979) 22

In re: Application of Consolidated Freight Co., 265 Mich 340; 251 NW 431 (1933) 20

Lindsey v Normet, 405 US 56, 31 L Ed 2d 36, 92 S Ct 862 (1972) 22

McKesson Corporation v Division of Alc. and Bev., 96 US 18, 110 L. Ed. 2d 17, 110 S Ct 2238 (1990) 19, 22

Memphis Light, Gas & Water Div. v Craft, 436 US 1, 56 L. Ed. 2d 30, 90 S Ct 1554 (1978) 19, 21

Muskegon Agency, Inc. v General Telephone Co. of Michigan, 340 Mich 472; 65 NW2d 748 (1954) 20

O'Brien v State Highway Commissioner, 375 Mich 545; 134 NW2d 700 (1965) 18

Ossius v City of St. Clair Shores, 344 Mich 693; 75 NW2d 25 (1956) 18

Patlex Corp. vs. Mossinghoff, 758 F.2d 594, 605 (1985) 17

People v Gauntlett, 134 Mich App 737; 352 NW2d 310 (1984) 24

Perry v Sindermann, 408 US 593, 603, 33 L. Ed. 2d 570, 92 S Ct 2694 (1972) . 22

Plyler v Doe, 457 US 202, 72 L. Ed. 2d 786, 102 S Ct 2382, reh den (US) 73 L. Ed. 1401, 103 S Ct 14 (1982) 14

Sullivan v MPSC, 93 Mich App 391; 287 NW2d 188 (1979) 12, 13

Westervelt v Natural Resources Commission, 402 Mich 412; 263 NW2d 564 (1978) 18-20

Williams Electric Coop, Inc. v Montana-Dakota Utilities Co., 79 NW2d 508 (N.D. 1956)

20

Wronski v Sun Oil Company, 108 Mich App 178, 187; 310 NW2d 321, 330 (1981) . 22

Statutes and Court Rules

28 USC §1257(a) 1, 2

1929 PA 9 ("Act 9") [MCLA §483.101, et seq.; MSA §22.1311, et seq.] . 2-4, 6-8, 12-14, 16, 17, 19

1982 PA 304 ("Act 304") [MCLA §460.6h, et seq.; MSA §22.13(6h), et seq.] 3, 7, 15

MCLA §462.26(8); MSA §22.45(8) . . . 23

Rule 501 [R 460.17501] of the Rules of Practice and Procedure Before the Commission 13

SCR 10(c) 2, 11

Section 4 of Act 9 [MCLA §483.104; MSA §22.1314] 2, 12, 13

Section 5 of Act 9 [MCLA §483.105; MSA §22.1315] 7, 9

Section 7 of Act 9 [MCLA §483.107; MSA §22.1317] 7, 9

Section 8 of Act 9 [MCLA §483.108; MSA §22.1318] 7, 9

Section 10 of Act 9 [MCLA §483.110, et seq.; MSA §22.1311, et seq.] 3, 6, 9, 10, 12-16, 18, 20

Constitutions

Article I, Section 10 of the U.S. Constitution 16

U.S. Constitution, 14th Amendment, Section 1 . . . . . 2, 16, 18, 21, 22, 25

APPENDIX CONTENTS

Appendix A --Order of the Michigan Supreme Court dated June 28, 1996 . . 1a

Appendix B -- Opinion of the Michigan Court of Appeals dated June 9, 1996 . 3a

Appendix C -- Opinion and Order of the Michigan Public Service Commission dated February 8, 1993 . . . . . 28a

Appendix D -- 28 USC § 1257(a) . . . 99a

Appendix E -- Section 1, 14th Amendment of the United States Constitution . 100a

Appendix F -- 1929 PA 9 ("Act 9") [MCLA §483.101, et seq., MSA §22.1311, et seq.] 101a

Appendix G -- SCR 10(c) 113a

Appendix H -- Letter Agreement between the parties dated August 7, 1989 . 114a

Appendix I -- Order of the Michigan Court of Appeals dated August 29, 1995 . 120a

Appendix J -- R 460.17501 (Rule 501 of the Rules of Practice and Procedure Before the Commission) 121a

PETITION FOR WRIT OF CERTIORARI

North Michigan Land & Oil Corporation, et al. respectfully petition for a Writ of Certiorari to review the Order of the Michigan Supreme Court denying Petitioner's Application For Leave To Appeal from an Opinion of the Michigan Court of Appeals and an Opinion and Order of the Michigan Public Service Commission, all of which are more fully discussed subsequently and are contained, verbatim, in the accompanying Appendix (Appendix "A", "B" and "C", infra).

OPINIONS BELOW

The Order of the Michigan Supreme Court (Appendix "A", infra) is unreported. The Opinion of the Michigan Court of Appeals (Appendix "B", infra) is reported at 211 Mich App 424; 536 NW2d 259 (1995). The Opinion and Order of the Michigan Public Service Commission (Appendix "C", infra) is unreported.

STATEMENT OF JURISDICTION

The Order of the Michigan Supreme Court (Appendix "A", infra) was entered on June 28, 1996.

The jurisdiction of this Court is invoked pursuant to 28 USC §1257(a). That statutory provision is set forth verbatim as Appendix "D", infra.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, ORDINANCES, RULES AND REGULATIONS INVOLVED

U.S. Constitution, 14th Amendment, Section 1 (Appendix "E", infra)

28 USC §1257(a) (Appendix "D", infra)

1929 PA 9 ("Act 9") [MCLA §483.101, et seq.; MSA §22.1311, et seq.] (Appendix "F", infra)

SCR 10(c) (Appendix "G", infra)

STATEMENT OF THE CASE

Petitioners are producers of oil and/or gas in the State of Michigan. Until November, 1993, they sold substantial volumes of such gas to Respondent Consumers pursuant to a Gas Purchase Contract dated July 1, 1977, as amended, which is on file with Respondent MPSC.

Consumers is a "common purchaser" of gas pursuant to Section 4 of Act 9 [MCLA §483.104; MSA §22.1314], and as such it is subject to control and regulation by the MPSC under the express provisions of Act 9. A copy of Act 9 is attached as Appendix "F".

This cause arose out of MPSC Case No. U-10029. On November 27, 1991, Consumers commenced that case with the MPSC, seeking to have the MPSC unilaterally reduce the price payable to Petitioners under the subject Contract. The principal constitutional issue involved in the case was the

constitutionality of Section 10 of Act 9 [MCLA §483.110, et seq.; MSA §22.1311, et seq.], both on its face and as applied by the MPSC and Michigan Court of Appeals. This issue is discussed in more detail subsequently

The July 1, 1977 Contract was amended pursuant to an Amendment of Gas Purchase Contract and Sales Agreement, a Settlement Agreement and an accompanying Letter Agreement dated August 7, 1989. The Settlement Agreement and Letter Agreement were entered into in connection with certain cases that were then pending at the MPSC, being MPSC Case Nos. U-8287, U-8287-R, U-8546, U-8546-R, U-8867, U-8867-R, U-9095 and U-9222. Those cases involved disputes over intrastate gas purchase contract prices and the amounts which could be passed through to Consumers ratepayers in Gas Cost Recovery ("GCR") proceedings under Michigan's GCR statute, 1982 PA 304 ("Act 304") [MCLA §460.6h, et seq.; MSA §22.13(6h), et seq.].

The foregoing MPSC cases began in 1986, when Consumers filed a GCR Plan with the MPSC under Act 304 in Case No. U-8287. In that case Consumers sought to recover from its ratepayers the full contractual price provided to be paid to Petitioners (and other intrastate producers) by Consumers. Consumers escrowed the difference between the full price and a much lower price pending the outcome of the MPSC proceedings. Subsequently, several GCR Plans were filed by Consumers which also included the full price payable under the Contract. In addition, Consumers filed two other Applications under Act 9, being

Case Nos. U-9095 and U-9222. In those two cases, Consumers sought to have the MPSC utilize Act 9 to unilaterally lower the price which Consumers was required to pay under its Contract with Petitioners and under various other Gas Purchase Contracts with intrastate gas producers. Petitioners and numerous other intrastate producers were parties to all of the above-referenced cases, which are collectively referred to in this Petition as "U-8287, et al."

In August of 1989, U-8287, et al. were purportedly settled by virtue of a Settlement Agreement which resolved the GCR issues in those cases and which eliminated Consumers' Act 9 Applications in Case Nos. U-9095 and U-9222. In resolving the GCR issues, the Settlement Agreement provided for the payment of a price lower than that provided to be paid under the Contract over a four (4) year period of time, but it also contained the following provision:

> "M. Conflicting Agreements:
>
> The parties to this Settlement Agreement recognize that in the settlement process, Consumers Power made agreements with individual producers which are at variance with this Settlement Agreement. The terms of the agreements with individual producers shall govern conflicts between an individual producer and Consumers if conflicts arise between those parties, but those private agreements shall not prevail over this Settlement

Agreement in instances of conflicts between Consumers and non-producer parties. Consumers Power agrees that if any such variations result in an obligation to pay a producer more than this Settlement Agreement recognizes as proper for GCR recovery, Consumers Power shall be responsible for such excess payments without recourse to its customers." (Emphasis added).

Petitioners executed the Settlement Agreement referred to above, but that execution was expressly conditioned upon certain terms and provisions which were set forth in the August 7, 1989 Letter Agreement. Under the Letter Agreement, a copy of which is attached as Appendix "H", Petitioners agreed to receive a lower price under the Contract for the four (4) year period referred to above, the term of the Contract was extended to November 1, 1995 and the price provided to be paid to Petitioners for gas sold and purchased under the Contract from and after December 1, 1991 was to be the full price as set forth in the Contract. Paragraph 10 of the Letter Agreement specifically provided that, in the event of a conflict between the provisions of the Letter Agreement and the Settlement Agreement, the provisions of the Letter Agreement would govern.

Consumers accepted and approved the terms and provisions contained in the August 7, 1989 Letter Agreement in writing and, subsequent to such acceptance and approval, the MPSC approved the Settlement Agreement by

virtue of an August 29, 1989 Order Approving Settlement Agreement. It has always been Petitioners' position that the August 7, 1989 Letter Agreement is a "private agreement" which is clearly covered by the above-quoted language of Subparagraph M of the Settlement Agreement.

After having received the benefit of a lower price for the four (4) year period referred to above, Respondent Consumers notified Petitioners in writing on November 27, 1991 that Consumers would not pay the full price set forth in the Contract as of December 1, 1991, thus totally disregarding the Settlement Agreement and the August 7, 1989 Letter Agreement entered into between the parties. On that same date, Consumers filed its MPSC Application in Case No. U-10029.[1]

In its MPSC Application, Consumers, relying upon Section 10 of Act 9 [MCLA §483.110; MSA §22.1320] sought to have the contract price lowered, retroactively to December 1, 1991, to a so-called "benchmark" price of $2.80 per unit of purchase or, in the alternative, sought

---

[1]Ironically, even though the settlement of the MPSC proceedings in 1989 purported to resolve these Act 9 matters, the relief which was sought by Consumers in its Application in MPSC Case No. U-10029 was virtually identical to the relief sought in its two (2) previous Act 9 Applications (Case Nos. U-9095 and U-9222) which were dismissed under the 1989 settlement.

to have the price lowered to a price which was no more than that which was authorized to be passed through to Consumers' ratepayers in GCR proceedings under Act 304.

Consumers also requested in its Application that the MPSC utilize Sections 7 and 8 of Act 9 [MCLA §483.107; MSA §22.1317 and MCLA §483.108; MSA §22.1318] to allow Consumers to reduce purchases under the Contract to the extent that the price which Consumers was required to pay for gas purchased under the Contract pursuant to Act 9 resulted in a booked cost of gas sold that was other than reasonable and prudent for purposes of Michigan's Gas Cost Recovery statute (Act 304, referred to previously).

Additionally, Consumers requested in its Application that the MPSC utilize Section 5 of Act 9 [MCLA §483.105; MSA §22.1315] to relieve Consumers from its obligation to purchase gas under the Contract during the period from December 1, 1991 through March 31, 1993 to the extent, if any, that the MPSC found that, for economic reasons, gas sold under that Contract was not at the time a "practicable source of supply".

Petitioners intervened in MPSC Case No. U-10029 in an attempt to protect their rights. Evidentiary hearings were thereafter held at the MPSC. After the record was closed, the parties filed Briefs, a Proposal for Decision ("PFD") was issued by the Administrative Law Judge, and Exceptions to the PFD were filed as well as Replies to those Exceptions.

On February 8, 1993, the MPSC issued its Opinion and Order in Case No. U-10029 (Appendix "C", infra). In its Opinion and Order, the MPSC:

(A) Found that it had jurisdiction under Act 9 to grant the relief requested in Consumers' Petition;

(B) Substantially reduced the price payable to Petitioners under the Contract which, as of the date of the Opinion and Order, was in excess of $4.00 per Mcf plus contractually reimbursable "add-ons". In this respect, the MPSC found that Consumers was only obligated to pay $3.558 per Mcf plus the "add-ons" provided for under the subject Contract for purchases of gas covering the period from December 1, 1991 to February 8, 1993 (the date of the Opinion and Order), despite the fact that the Contract provides for the payment of a much higher price during that period of time. The MPSC also found that effective as of February 8, 1993, the price was to be lowered to $2.80 per MMBtu, with no allowance for the "add-ons" which are expressly provided for under the Contract;

(C) Found that since Consumers had not obtained MPSC approval of the August 7, 1989 Letter Agreement, the MPSC was not

obligated to give the Letter Agreement any legal effect;

(D) Found that the July 1, 1977 Contract could be terminated by either party thereto on November 1, 1993, despite the fact that the August 7, 1989 Letter Agreement specifically provides that the Contract shall be in effect until November 1, 1995, despite the fact that Consumers did not take the position in Case No. U-10029 that the Contract terminated prior to November 1, 1995 and despite the fact that Consumers had previously acknowledged on at least two (2) separate occasions in writing that the Contract remained in effect until November 1, 1995;

(E) Found that the authority over price granted to the MPSC under Section 10 of Act 9 includes the power to determine, contrary to the express terms of the Contract, that Consumers need not pay any compression reimbursement fees or severance tax reimbursement [these being the "add-ons" referred to in subparagraph (B) above];

(F) Found that the MPSC has the authority under Sections 5, 7 and 8 of Act 9 to reduce the volumes of gas which Consumers is obligated to purchase under the Contract, although also finding that volume limitations

were not necessary in this instance because of the significant reduction in price ordered by the MPSC;

(G) Agreed that it was Petitioners' position that the MPSC has no authority to decide constitutional issues but then went on to address those issues anyway and found that granting the relief requested by Consumers would not violate Petitioners' constitutional rights and that Section 10 of Act 9 is not unconstitutional, on its face or as applied by the MPSC; and

(H) Ruled that Consumers' Application was not barred pursuant to the doctrines of res judicata or collateral estoppel.

Following the issuance of the MPSC's Opinion and Order on February 8, 1993, Petitioners appealed to the Michigan Court of Appeals. Approximately two (2) years later, on June 9, 1995, the Court of Appeals issued its Opinion affirming the MPSC's Opinion and Order (Appendix "B", infra). On June 30, 1995, Petitioners filed a Motion For Rehearing in the Michigan Court of Appeals. On August 29, 1995 the Michigan Court of Appeals issued a one-sentence Order Denying Petitioners' Motion For Rehearing, giving no rationale for its decision. A copy of the Court of Appeals Order Denying Motion For Rehearing is attached as Appendix "I".

In Michigan, it is necessary to obtain leave to appeal when one is seeking to have the Michigan Supreme Court review a decision of the Michigan Court of Appeals, since Supreme Court review is discretionary and not a matter of right. Hence, on September 19, 1995, Petitioners filed an Application For Leave To Appeal with the Michigan Supreme Court, requesting that Court to grant discretionary review of the issues involved in this matter. Briefs were filed by all parties to the case in the Michigan Supreme Court. On June 28, 1996, the Michigan Supreme Court denied Petitioners' Application For Leave To Appeal in a one sentence Order (Appendix "A", infra). Petitioners seek to have this Court review the Michigan Supreme Court's refusal to review the decisions of the MPSC and Michigan Court of Appeals, and further seek to have those decisions overturned.

REASONS FOR GRANTING THE WRIT

The Opinion and Order of the MPSC and the Opinion of the Michigan Court of Appeals which upheld the MPSC's decision should be reversed inasmuch as they have decided important federal (constitutional) questions in a way which conflicts with the 14th Amendment to the U.S. Constitution and relevant decisions of this Court holding that a party may not be deprived of property without due process of law and that a party may not be denied equal protection of the laws. SCR 10(c) (Appendix "G", infra).

I

THE MPSC AND MICHIGAN COURT OF APPEALS ERRED IN DETERMINING THAT GRANTING THE RELIEF REQUESTED BY CONSUMERS WOULD NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PETITIONERS AND THAT SECTION 10 OF ACT 9 WAS NOT UNCONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED IN THIS CASE

(A) Section 10 of Act 9 Violates Petitioners' Equal Protection Rights On Its Face:

Petitioners argued in the MPSC and in the Michigan Court of Appeals, among other things, that Section 10 of Act 9 is unconstitutional on its face because it grants common purchasers the right to seek a reduction in price but does not give producers a corresponding right to seek a price increase. A straightforward reading of Section 10 of Act 9 clearly establishes that Petitioners' argument in that regard is correct. However, the MPSC and Michigan Court of Appeals rejected that argument on the following two grounds: (a) they determined, erroneously, that in Sullivan v MPSC, 93 Mich App 391; 287 NW2d 188 (1979), a producer was allowed to use Act 9 to seek a price increase; and (b) they found that a producer has "equal access" to the MPSC when a common purchaser applies for price approval under Act 9. The foregoing rulings were clearly erroneous for the reasons discussed below.

First, the Court's reliance on Sullivan v MPSC was misplaced. That case involved a claim of discrimination by a producer under Section 4 of Act 9 [MCLA

§483.104; MSA §22.1314]. Section 4 of Act 9 expressly prohibits common purchasers from discriminating as to the price paid for like grades of gas. Rule 501 of the Rules of Practice and Procedure Before the Commission [R 460.17501] (Appendix "J", infra), expressly authorizes a producer to file a complaint with the MPSC if that producer feels that it is the subject of the price discrimination which is expressly forbidden by Section 4 of Act 9. That is what was done by the producer in the Sullivan case, because there was express provision made for such a proceeding. By contrast, nothing in Section 10 of Act 9 gives a producer a right to file a complaint seeking a price increase. Section 10 only refers to the common purchaser being allowed to file an application, not the producer. Accordingly, the Sullivan decision has no applicability to this case, and the MPSC's and Michigan Court of Appeals' reliance on it was not a proper basis to reject Petitioners' equal protection arguments.

Furthermore, the MPSC's and Michigan Court of Appeals' rejection of Petitioners' equal protection arguments on the grounds that a producer can ask for a price increase if a common purchaser applies for a price approval under Act 9 is erroneous and completely begs the question. The issue raised by Petitioners with respect to equal protection was that the producers do not have a right to initiate a proceeding under Section 10 of Act 9 seeking a price increase, while a common purchaser has the right to initiate a proceeding under that section seeking a price decrease.

That issue is not adequately addressed by simply concluding, as the MPSC and Michigan Court of Appeals did, that as long as the common purchaser initiates such a proceeding, the producer has a right to request a price increase. The point is, what happens if the common purchaser does not institute a price approval proceeding under Act 9? The answer is obvious -- the producers are totally without a vehicle to pursue a price increase. There is no basis in any Michigan statute or MPSC Rule which even comes close to providing the producers with such a vehicle. Moreover, as a practical matter, if a common purchaser seeks a price decrease based on gas market conditions, a producer is not going to be able to obtain a price increase under those same conditions.

As Petitioners argued below, the one-sided procedure provided for in Section 10 of Act 9 surely must violate the equal protection rights granted to producers under the U.S. Constitution. The MPSC's and Court of Appeal's determination to the contrary was clearly erroneous and contrary to decisions of this Court which confirm that the 14th Amendment prohibits depriving a party of equal protection of the laws. See, for example, Plyler v Doe, 457 US 202, 72 L. Ed. 2d 786, 102 S Ct 2382, reh den (US) 73 L. Ed. 1401, 103 S Ct 14 (1982).

In Plyler, this Court made it clear that in applying the Equal Protection Clause to most forms of state action, the Court must assure that the classification at issue bears some fair relationship to a legitimate public purpose. Here, there is absolutely no legitimate public

purpose to be served by the classification in Section 10 of Act 9 which allows a common purchaser such as Consumers to seek a gas purchase contract price decrease while not affording the gas producer a corresponding right to seek a price increase. The fact that there is no public purpose to be served by such classification is readily apparent when one recognizes that the public is fully protected from any "unreasonable" gas costs incurred by Respondent Consumers under Act 304 (Michigan's GCR statute).

Further on the subject of "public purpose," it must be noted that Consumers' Application to the MPSC was not filed by a governmental agency nor by a Consumers' ratepayer, but by Consumers. This action was not taken so as to accomplish a public purpose, but rather was taken to save Consumers' stockholders from monetary loss. Because the MPSC refused to allow Consumers to recover from its ratepayers the entire amount of the agreed-upon contract price in GCR proceedings under Act 304, Consumers' stockholders were faced with bearing the difference between the MPSC permitted recovery from the ratepayers and the contract price. So that its stockholders would escape having to bear this deficiency, and ignoring its contractual obligation to Petitioners, Consumers applied for and was granted the aforementioned MPSC Opinion and Order reducing the price (Appendix "C", infra). While the MPSC's Opinion and Order purported to solve the predicament of Consumers' stockholders, it did so at the expense of the Petitioners. The "public" (Consumers' ratepayers) was not impacted

either by Consumers' Application or by the result in MPSC Case No. U-10029.

In summary, the classification in Section 10 of Act 9 violates Petitioners' equal protection rights because it bears no fair relationship to a legitimate public purpose. As a consequence, the decision of the MPSC and Michigan Court of Appeals which rejected Petitioners' argument that Section 10 of Act 9 deprives the Petitioners of Equal Protection of the Laws was in conflict with the 14th Amendment to the U.S. Constitution and relevant decisions of this Court holding that a party cannot be denied Equal Protection of the Laws.

(B) The Impairment of Contract Prohibition of the U.S. Constitution Was Violated:

The MPSC's and Michigan Court of Appeals' decisions, if upheld, will clearly result in Act 9 being interpreted, applied and administered in a manner which impairs or abrogates the contractual rights of Appellants, in violation of the Impairment of Contract prohibition contained in Article I, Section 10 of the U.S. Constitution.

It is well-settled that, even though a statute such as Act 9 may appear on its face to be constitutionally valid, it may nonetheless be interpreted by an administrative agency in such a fashion as to result in an unconstitutional application of the statute. In this respect, a Federal Circuit noted in Patlex Corp. vs. Mossinghoff, 758 F.2d 594, 605 (1985) that:

"A statute that is valid on its face may nevertheless be administered in such a way that constitutional or statutory guarantees are violated:

[the courts] must reject administrative constructions of statutes, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32; 102 S.Ct. 38, 42; 70 L.Ed. 2d 23 (1981)" (Emphasis added).

The mere fact that Act 9 predated the Contract involved in this case does not mean that the Contract cannot be unconstitutionally impaired by an improper interpretation and application of the Act. As Mossinghoff confirms, the law clearly recognizes the fact that the interpretation and application a statute, as contrasted with the statute itself, can cause the unconstitutional impairment. Act 9 was used by the MPSC and Court of Appeals as a vehicle to effectively eliminate, abrogate or modify critical provisions of the subject Contract. Such interpretation and application was unconstitutional.

(C) Petitioners Due Process Rights Under the 14th Amendment to the U.S. Constitution Were Violated:

If upheld, the MPSC's and Court of Appeals' decisions will result in Section 10 of Act 9 being utilized in a manner which denies Appellants Due Process of Law. The Due Process guarantees of the U.S. Constitution are violated by Section 10 of Act 9 because there are no adequate standards contained in the last sentence of Section 10 with respect to the MPSC's power to approve a price change.

In Westervelt v Natural Resources Commission, 402 Mich 412; 263 NW2d 564 (1978) the Michigan Supreme Court held, inter alia, that Due Process requires that safeguards exist in the nature of standards in statutes which delegate legislative power to administrative agencies. The Court noted that such standards were necessary so that the public would be protected against potential arbitrary exercise and abuse of discretion at the hands of administrative officials. In accord are Ossius v City of St. Clair Shores, 344 Mich 693; 75 NW2d 25 (1956); O'Brien v State Highway Commissioner, 375 Mich 545; 134 NW2d 700 (1965); and Blue Cross and Blue Shield of Michigan v Governor, 422 Mich 1; 367 NW2d 1 (1985).

As was the case in each of the above decisions which found the particular statute involved therein to be unconstitutional, there is absolutely no standard contained in Section 10 of Act 9 relative to the "approval" power purportedly granted to the MPSC thereunder. Accordingly, Section 10

violates the due process guarantees of the U.S. Constitution and cases of this Court confirming that a party may not be deprived of any significant property interest being afforded due process of law. See, for example, McKesson Corporation v Division of Alc. and Bev., 96 US 18, 110 L. Ed. 2d 17, 110 S Ct 2238 (1990); Memphis Light, Gas & Water Div. v Craft, 436 US 1, 56 L. Ed. 2d 30, 90 S Ct 1554 (1978).

(D) Constitutional Separation of Powers Principles Were Violated:

In addition to the above constitutional infirmities, the MPSC's February 8, 1993 Opinion and Order and the Michigan Court of Appeals' Opinion which upheld that decision resulted in a construction and use of Act 9 in a manner which violated the Separation of Powers principles contained in the U.S. Constitution, for two (2) reasons.

First, as construed by the MPSC and Michigan Court of Appeals, Act 9 represents an unconstitutional delegation of legislative power to an administrative agency. The Michigan Supreme Court in Westervelt, supra, analyzed the constitutional requirements for delegation of legislative power to an administrative agency. The Court stated at page 443 of the Westervelt Opinion that a delegation of legislative power to an administrative agency satisfies the constitutional Separation of Powers principles only if the legislation by which the power is delegated expressly or by reference includes standards "as reasonably precise as the subject matter [of the legislation] requires or

permits". Applying the Westervelt analysis to this case, it is apparent that the Separation of Powers principles would be violated if the MPSC's and Court of Appeals' decisions are upheld because, as noted above, there are no standards set forth in Section 10 of Act 9 relative to the Commission's power to "approve" a price change.

Secondly, the Separation of Powers principles would clearly be violated if the MPSC's and Michigan Court of Appeals' decisions were allowed to stand since those decisions improperly allowed a legislative body, the MPSC, to perform a judicial function, namely, the reformation of a contract. There is no question but that the MPSC's Opinion and Order resulted in reformation of the subject Contract as to price, term and other provisions. There can also be no question but that reformation of a contract is a judicial function beyond the jurisdiction of the MPSC.

It is well settled that the Commission cannot perform judicial functions, since it has no jurisdiction or authority to do so. In re: Application of Consolidated Freight Co., 265 Mich 340; 251 NW 431 (1933); and Muskegon Agency, Inc. v General Telephone Co. of Michigan, 340 Mich 472; 65 NW2d 748 (1954). In addition to the aforecited case authority from Michigan, cases from other jurisdictions also make it quite clear that there is no authority on behalf of a regulatory body such as the Commission to engage in the adjudication of contract rights. See, for example, Williams Electric Coop, Inc. v Montana-Dakota Utilities Co., 79 NW2d

508 (N.D. 1956) (holding that administrative agencies do not have any power to adjudicate contract rights or construe contracts); and Brown v Smith, 225 SW2d 91 (Tenn. App. 1949) (noting that the Interstate Commerce Commission is an administrative body, not a court, and has no jurisdiction or authority to adjudicate legal controversies such as the validity of contracts).

Here, there can be no doubt that the MPSC, a legislative body, performed a judicial function to the extent that it interpreted and reformed the subject contract. Thus, the MPSC's decision, and the Michigan Court of Appeals' Opinion upholding the same, violated the Separation of Powers Principles contained in the U.S. Constitution.

(E) The Nature of The MPSC Proceedings And The Nature And Scope Of Michigan Appellate Review of MPSC Decisions Resulted In A Denial Of Petitioners' Property Without Due Process of Law:

The 14th Amendment to the U.S. Constitution places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause. Memphis Light, Gas & Water Div. v Craft, supra, at 436 US 9; Board of Regents v Roth, 408 US 564, 577, 33 L. Ed. 2d 548, 92 S Ct

2701 (1972); and Perry v Sindermann, 408 US 593, 603, 33 L. Ed. 2d 570, 92 S Ct 2694 (1972).

This Court has made it quite clear that the 14th Amendment protects against confiscation of private property or income therefrom. See, for example, Lindsey v Normet, 405 US 56, 31 L Ed 2d 36, 92 S Ct 862 (1972). Here, there can be no question but that Petitioners have a property interest in the subject wells and the income produced therefrom. Accordingly, the 14th Amendment protects that interest from confiscation by the MPSC.

In McKesson, supra, this Court found that before a party may be deprived of property, he must be afforded a meaningful hearing. Here, Petitioners were not provided with either a meaningful hearing or meaningful judicial review. The MPSC has no authority to exercise judicial functions and may not address constitutional issues because it does not have the jurisdiction to do so. Wronski v Sun Oil Company, 108 Mich App 178, 187; 310 NW2d 321, 330 (1981); Galembiowski v Madison Heights Civil Service Commission, 93 Mich App 137, 153; 286 NW2d 69, 85 (1979). Hence, although the MPSC purported to decide the constitutional issues which were raised by Petitioners in MPSC Case No. U-10029, it did not have the authority to do so. Moreover, the Michigan Court of Appeals provided no meaningful review of the constitutional issues involved in this case, as can readily be seen from reviewing the Court of Appeals' Opinion, which basically addressed the constitutional questions in a very brief,

perfunctory manner. This lack of adequate appellate review of the MPSC's Opinion and Order is not surprising given the extremely narrow scope of review which Michigan statutory law establishes in connection with MPSC Orders.

Under Michigan law, there is no expeditious, adequate and thorough judicial review of orders issued by the MPSC. While review of such orders used to be de novo by the Ingham County, Michigan Circuit Court, that is no longer the case. Instead, MPSC orders are now reviewed on appeal by the Michigan Court of Appeals, pursuant to MCLA §462.26; MSA §22.45, which provides in pertinent part as follows:

> "Except as otherwise provided...any common carrier or other party in interest, being dissatisfied with any order of the Commission fixing rate or rates, fares, charges, classifications, joint rate or rates or any order fixing any regulations, practices or services may within 30 days from the issuance and notice of that order file an appeal as of right in the Court of Appeals."

The Court of Appeals' scope of review under the foregoing statute is extremely narrow. Pursuant to MCLA §462.26(8); MSA §22.45(8), a party appealing an MPSC Opinion and Order must show by "clear and convincing evidence" that the Opinion and Order was "unlawful or unreasonable". That type of review is neither thorough nor adequate.

Nor is the Michigan Court of Appeals review expeditious. For example, in this case even though the claim of appeal was filed with the Michigan Court of Appeals in February, 1993, it was nearly 2 1/2 years later, in June of 1995, before the Court of Appeals issued its Opinion upholding the MPSC's Opinion and Order. The foregoing method of review of MPSC Opinions and Orders certainly does not constitute an adequate or efficient remedy because the Court of Appeals cannot hear any testimony or evidence on the constitutional issues involved and thus cannot fully examine the same.

Moreover, any assumption that the Michigan Court of Appeals could adequately address Petitioner's constitutional claims is unwarranted in view of the well-settled principle that an appellate court will not pass on unconstitutional issues and will avoid resolving a case on constitutional grounds if there are other decisive questions raised by the record which dispose of the case. People v Gauntlett, 134 Mich App 737; 352 NW2d 310 (1984); Consolidation Coal Co v Department of Treasury, 141 Mich App 483; 366 NW2d 587 (1985).

Here, the Michigan Court of Appeals inquiry on appeal was limited to the record adduced at the MPSC. The Court of Appeals uses a rubber stamp approach to appeals from MPSC Orders and the statutory scope of review is extremely narrow. Such a procedure clearly resulted in depriving Petitioners of their property and the income therefrom without due process of law, in violation

Constitution and the foregoing case authority from this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

J. Andrew Domagalski
Attorney for Petitioners

Jeffrey D. VanLeuwen
Attorney for Petitioners

BUSINESS ADDRESS:
8992 East D Avenue
P.O. Box 366
Richland, MI 49083
(616) 629-9791

Byron P. Gallagher
Attorney for Petitioners

BUSINESS ADDRESS:
555 North Main Street
P.O. Box 446
Mt. Pleasant, MI 48858
(517) 773-9961

Appendix "A"

Michigan Supreme Court
Lansing, Michigan

Order
Entered: June 28, 1996

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

104293-5

NORTH MICHIGAN LAND & OIL CORPORATION, THE RAY D. MARKEL TESTAMENTARY RESIDUAL TRUST B, by RON D. MARKEL and JAMES W. MARKEL, as Co-Trustees, NIELSON ENTERPRISES CORPORATION, NIELSON ENTERPRISES LIMITED PARTNERSHIP, NORTH MICHIGAN GAS & OIL, a Limited Partnership, DAVID E. NIELSON, DALE M. NIELSON, GERALD J. TALBOT, CMK ENTERPRISES, INC., THE IDONEA HERSEE TRUST, by IDONEA HERSEE, as Trustee, THE HERSEE CORPORATION, DENNIS OLSON, SANDRA OLSON and ENERGY RESERVES, INC.

Plaintiffs-Appellants,

SC: 104293-5
COA: 162164, 162190, 162191
LC: MPSC No. U-10029

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS POWER COMPANY, and FRANK J. KELLY, as Attorney General for the State of Michigan,

Defendants-Appellees.

On order of the Court, the applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

80625

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL OF THE MICHIGAN SUPREME COURT, LANSING

s/ Corbin R. Davis
June 28, 1996

Appendix "B"

STATE OF MICHIGAN

COURT OF APPEALS

NORTH MICHIGAN LAND & OIL CORPORATION, THE RAY D. MARKEY [sic] TESTAMENTARY RESIDUAL TRUST B by RON D. MARKEL and JAMES W. MARKEL, as co-trustees, NIELSON ENTERPRISES CORPORATION, NIELSON ENTERPRISES LIMITED PARTNERSHIP, NORTH MICHIGAN GAS & OIL, a limited partnership, DAVID E. NIELSON, DALE M. NIELSON, GERALD J. TALBOT, and CMK ENTERPRISES, INC.,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, ATTORNEY GENERAL and IDONEA HERSEE,

Appellees.

FOR PUBLICATION
June 9, 1995
9:00 A.M.

No. 162164
LC No. U-10029

ENERGY RESERVES, INC.,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS POWER COMPANY and ATTORNEY GENERAL,

Appellees.

No. 162190
LC No. U-10029

THE IDONEA HERSEE TRUST, by IDONEA HERSEE as trustee, DENNIS OLSON and SANDRA OLSON,

Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS POWER COMPANY and ATTORNEY GENERAL,

Appellees.

No. 162191
LC No. U-10029

Before: Fitzgerald, P.J., and Marilyn Kelly and G.N. Bashara, Jr., *JJ.

PER CURIAM.

---

*Former Court of Appeals judge sitting on the Court of Appeals by assignment.

In these consolidated cases, appellants appeal as of right from a February 8, 1993 decision of the Michigan Public Service Commission (PSC) on Consumers Power Company's application for a change in the price it pays appellants for natural gas. The following statement of facts is condensed from the Commission's decision.

Under a July 1, 1977 gas purchase contract, Amoco Production Company agreed to sell to Consumers gas produced in Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego and Montmorency Counties. Appellants are Amoco's successors in interest. The contract was to remain in effect until at least November 1, 1991 and thereafter year-to-year, subject to cancellation by either party.

The contract stated that, for periods after June 30, 1978, gas was priced at the lower of a base price and an alternate price. The base price was $1.995 per Mcf as of July 1, 1978 and escalated by 5 percent every six months. The alternate price was the reported market price for No. 2 fuel oil.

In Case No. U-8287, Consumers' 1986 GCR plan, the Commission held in a January 27, 1987 order that the intrastate component of Consumers' gas supply was too costly. That prompted Consumers to seek renegotiation of its intrastate gas purchase contracts, including the 1977 contract.

Eventually, a settlement was reached. Consumers, numerous producers and other parties entered into a comprehensive settlement agreement, which was approved by the Commission on August 29, 1989, setting ceiling prices for Consumers' purchases of natural gas at $3.050/Mcf for 1989, $3.924/Mcf for 1990, and $3.558/Mcf until November 1991.

In the meantime, Consumers and appellants entered into a separate letter agreement, dated August 7, 1989, which extended the original term of the 1977 gas contract from November 1, 1991 to November 1, 1995, among other things. This agreement superseded a previous agreement between the parties executed on January 1, 1988. That agreement had also provided for an extension of the original ceiling prices in 1989, 1990 and 1991 identical to those set forth in the U-8287 settlement agreement. However, it further provided for a return to the original contract price formula after December 1, 1991.

The existence of the private agreement between Consumers and individual producers was recognized in the August 29, 1989 settlement agreement approved by the MPSC in Case No. U-8287. The recognition took the form of a prohibition of recovery from ratepayers of any extra expense incurred due to variation from the terms of the settlement agreement and the letter agreement. However, neither the parties' August 7, 1989 individual agreement nor their previous agreement of January 1,

1988 was submitted to or approved by the Commission.

On November 27, 1991, a few days before the expiration of the time period covered by the MPSC-approved settlement agreement in Case No. U-8287, Consumers commenced the instant proceeding with the Commission.

Consumers' application, filed pursuant to 1929 PA 9, MCL 483.101 et seq.; MSA 22.1311 et seq., sought approval of a proposed price reduction and other modifications of its natural gas contracts with producers. Specifically, Consumers sought approval of a price of $2.80 MMBtu as a just and reasonable price for purchases from December 1, 1991 to March 31, 1993. Also, it sought relief from purchase obligations under its contracts which had become uneconomical. It sought, also, a determination that gas it was obliged to purchase be recovered as part of its gas cost recovery, pursuant to 1982 PA 304, MCL 460.6h et seq.; MSA 22.13(6h) et seq.

On February 8, 1993, the Commission issued a 51-page opinion and order, reducing the contract price to $2.80/MMBtu, inclusive of "add-on" charges, among other things. The Commission also held that the original November 1, 1991 cancellation date under the 1977 contract was still in effect. Thus any party could exercise the right of cancellation as of the next anniversary cancellation date, November 1, 1993, or November 1 of any subsequent

year. The Commission rejected appellants' reliance upon their August 7, 1989 private agreement with Consumers. The agreement purported to extend the term of the contract until November 1, 1995. It also rejected appellants' argument that this amendment of the original contract had been approved when the Commission approved the settlement agreement in Case No. U-8287. The Commission found that, since the amendment had never been approved by it, it was legally ineffective.

NORTH MICHIGAN & ENERGY RESERVES' APPEALS

We discuss first the issues raised by North Michigan and Energy Reserves, because several of them are identical. Then we will discuss the constitutional issues raised by the parties, including, principally, Hersee.

JURISDICTION

North Michigan and Energy Reserves argue that the Commission lacks jurisdiction under Act 9 to change a contract price for gas. They assert that price approval authority is limited to preventing discrimination against producers and to promoting conservation. Appellants distinguish the leading authority on a number of grounds.

The authority is Antrim Resources v Public Service Commission, 179 Mich App 603; 446 NW2d 515 (1989) and Miller Bros v Public Service Commission, 180 Mich App 227; 446 NW2d 640 (1989).

Those decisions recognize the Commission's authority to approve gas purchase prices between a common purchaser, such as Consumers, and Michigan producers under § 10 of PA 9, MCL 483.110; MSA 22.1320 which provides in part:

> Thereafter [filing initial price schedule], a common purchaser or common carrier of natural gas may alter or amend its price paid, rates, charges and conditions of service by application to and approval by the commission in the same manner and by the same process and under the same legal limitations and like right as are now provided by statute for the regulation by the commission of the rates for electricity transmitted in this state. [Emphasis added. 179 Mich App at 610.]

The statutory reference is to 1909 PA 106, MCL 460.551 et seq.; MSA 22.151 et seq.

In Antrim Resources, the central issue "concerned the producers' assertions that...the PSC did not have jurisdiction under § 10 of 1929 PA 9 to establish prices that Mich Con may pay for commonly purchased natural gas." 179 Mich App at 608. The Court held that PA 9 was intended to grant the Commission power to control and regulate corporations engaged in the business of

purchasing or selling natural gas for public use. 179 Mich App at 609. The Court concluded that "the statute quite clearly confers jurisdiction on the PSC to approve any alterations or amendments to the price a common purchaser may pay for natural gas." 179 Mich App at 611. That jurisdiction includes the power "to inspect and interpret the price aspect of contracts entered into by common purchasers and to determine the reasonableness of requested price changes." 179 Mich App at 615.

Contrary to appellants' contention here, Act 9 was not designed solely to promote conservation and to prevent discrimination against producers. 179 Mich App at 612. The rationale for the decision is that "producers who enter into contracts with common purchasers are charged with the knowledge that they are subject to the jurisdiction of the PSC to the extent that the pricing provisions in their contracts with common purchasers and any alterations or amendments in the price are subject to PSC approval." Ibid. The purchase price is simply not a matter of private contract. 179 Mich App at 615.

Finally, the Court held that Commission scrutiny of prices was not a violation of the constitutional right against impairment of contract, because the contracts had been made after the statute took effect. 179 Mich App at 616.

Antrim Resources was approved in Miller Bros v PSC, supra, 180 Mich App at 233, where the Court said:

> We agree with the reasoning and conclusion of the Antrim Resources panel that under Act 9 the PSC has jurisdiction to regulate changes and contract prices by way of approving the reasonableness of those prices. Section 10 of Act 9 clearly provides that contract price changes may be made "by application to and approval by" the PSC. And as in Antrim Resources, the PSC's actions in this case do not impair or infringe the producers' rights to freely contract. The producers were engaged in an extensively regulated area of commerce and executed their contracts after Act 9 had long been in existence.

Appellants also argue that the Commission has authority only to approve or disapprove an already agreed-upon price change. They claim that it exceeded its authority under the statute by "unilaterally" establishing a lower contract price in this case. Appellants' position has been rejected by this Court in cases upholding the Commission's authority to require that contract prices conform with its rates and tariffs, including pricing under initial contracts as well as proposed amendments. Midland Cogeneration Venture Limited Partnership

v MPSC, 199 Mich App 286, 308-310; 501 NW2d 573 (1993), Antrim Resources, supra at 611.

ESTOPPEL, RES JUDICATA, ETC.

All of the appellants contend that prices were fixed by the parties' private letter agreement of August 7, 1989 and ratified by the Commission's August 29, 1989 settlement agreement order in Case No. U-8287. They reason that the order was therefore res judicata and estopped Consumers from seeking price changes in this proceeding. The three criteria for res judicata are satisfied. The Commission's August 29, 1989 order approving the settlement is final.

We disagree. Sections 10 and 11 of Act 9 require that utilities file gas purchase contracts with the Commission and that the Commission approve prices. Antrim Resources v Public Service Comm, supra. The prices agreed on by the parties' private agreement were not disclosed to the Commission and were not expressly approved by it. Moveover, the Commission's August 29, 1989 order approving the private settlement provided for price approvals for 1989 through November 1991. The settlement reserved to the parties the right to contest prices after November 30, 1991. Hence, as the Commission ruled, "Neither the settlement nor the order approving it can be read to authorize undisclosed private agreements that purport to govern pricing after November 30, 1991."

Further, as the Commission held, res judicata does not apply because, as discussed, approval of the settlement was not the equivalent of approving the 1989 private agreement. Nor did the settlement intend to fix prices after November 1991.

Moreover, as noted by the MPSC, the settlement agreement in Case No. U-8287 specifically provides that the settlement and any order adopting it "shall not be cited or used as precedent in any other proceeding unless clearly stated otherwise." Also, the settlement "does not limit any party's right to adopt different positions on similar issues in other administrative and/or related judicial proceedings."

Finally, as we held in Antrim Resources, "producers who enter into contracts with common purchasers are charged with the knowledge that they are subject to the jurisdiction of the PSC to the extent that the pricing provisions in their contracts with common purchasers and any alternations or amendments in the price are subject to PSC approval." 179 Mich App at 612.

For that reason, too, Energy Reserves cannot claim that it obtained financing with the expectation that prices in the original purchase agreement would be honored. Therefore, as the Commission concluded, its "obligation to evaluate whether an amendment or alteration to a contract effects a just and reasonable price cannot be avoided by

private agreements, and a person purchasing an interest as a seller under a preexisting contract cannot reasonably disclaim prior knowledge of the regulatory requirements imposed by Act 9."

FEES AND TAXES

North Michigan claims that the Commission has no authority under Act 9 to deny reimbursement of compression fees and severance taxes which Consumers agreed to pay. They urge this is especially true where the utility did not request that relief in its application.

The Commission's decision on this point is not unlawful. Add-ons such as compression fees and severance taxes are expenses of production usually shared by producers and royalty interest owners. 3 Williams, Oil & Gas Law, §645.2 (1993 ed), see also Brown v Shell Oil Company, 128 Mich App 111; 339 NW2d 709 (1983). They are presumably included in the producers' costs and recovered in the price paid by the utility.

TERMINATION DATE

North Michigan contends that the Commission had no authority under § 10 to determine that the parties could terminate the private letter agreement after November 1, 1993 when the agreement continued the contract to November 1, 1995.

We find it unnecessary to address the Commission's authority as North Michigan requests. The letter agreement never became effective, because it was not filed with or approved by the Commission. Since it was not effective, the termination date of the 1977 contract remained in effect. Under that contract, either party could terminate the agreement effective November 1 by giving notice August 1. At the time of the Commission's decision, the earliest available cancellation date would have been November 1, 1993. In fact the contract between North Michigan and Consumers was cancelled as of November 1, 1993.

ALTERATION OR AMENDMENT?

North Michigan contends that the Commission had no authority to set prices under § 10 because the parties did not "alter or amend" their prices. It urges that the letter agreement did not change the original pricing provisions of the subject contract. That document merely instituted prices during a limited period, at which time the original pricing provision of the original contract was reinstated. That original contract price never changed.

The contention is not meritorious. The letter agreement recognized on its face that it was an amendment to the 1977 contract. Moreover, the agreement changed the price of gas specified in the original contract, at least for the period ending November 30, 1991.

It was thus an "alteration or amendment" of the original gas price, subject to review under § 10.

CONSUMERS' FAILURE TO FILE

North Michigan and Energy Reserves contend that the Commission improperly relied on Consumers' failure to file the private agreement as the reason for changing prices, contrary to the price provisions of the agreement. They contend that paragraph M of the settlement agreement, referring to the private agreement, gave the Commission notice of the price agreement. Even if a separate filing was required, they argue, it is unjust and unreasonable for the Commission to use the utility's statutory violation as a means of exonerating the utility from its private agreement obligations.

These appellants argue that, had the utility timely filed, the Commission would have been obligated to make timely objections. Had it done so, they continue, Energy Reserves would have been aware of the objections before it purchased an interest in the contracts, relying on the effectiveness of the prices stated in them. Northern Michigan says that it has been penalized millions of dollars by Consumers' failure to carry out its obligations under Act 9.

We reject the arguments. Section 10 requires Commission approval of a price change. Antrim Resources v MPSC, supra. The price changes in the letter agreement

were not submitted to or approved by the Commission. The producers cannot suspend § 10 or rely on equitable considerations to supply statutory approval of price changes that were not revealed to the Commission.

Even if the letter agreement had been filed, Consumers could have sought approval of the prices under Act 9, and the producers could not have relied on the prices set in the letter agreement.

INTERPRETING THE CONTRACT

North Michigan claims that the Commission improperly exercised judicial power when it ruled on the validity of the letter agreement and declared the rights of the parties.

Antrim Resources v MPSC, supra, rejected a similar contention when it held that § 10 authorized the Commission to approve contract changes. Implicit in that authority is the fact that "the PSC will inspect and interpret the pricing provisions in these contracts to determine whether they conform with [PSC] rules and regulations." 179 Mich App 611-612. Therefore, the court concluded that "the producers' contention that 1929 PA 9 does not grant the PSC jurisdiction and authority to interpret contracts between Mich Con and the producers is without merit." 179 Mich App at 612.

EXPANDED PRODUCTION?

North Michigan says that there is no support for the Commission's criticism that the producer expanded its production to take maximum advantage of the negotiated price premium over the market price.

This point is not an important issue. The Commission made the comment in rejecting suggestions that price determination be based in part on equitable considerations.

The Commission's comments were aimed at all parties. It observed that "none of the parties to the contract can fairly claim to have acted above reproach in negotiating and implementing the 1989 agreement."

Appellant has not shown that the Commission's unflattering comments about the parties' conduct influenced its decision.

MCF OR MMBTU

North Michigan claims that the PSC lacked authority to set the price in MMBtu terms, because the contract called for payment on an MCF (thousand cubic foot) basis.

The point is without merit. The 1977 contract called for a price adjustment based on the Btu content per cubic foot.

JUST AND REASONABLE

The letter agreement price is the only just and reasonable price, North Michigan argues. Consumers could have protected itself with "regulatory out" or "market out" clauses. North Michigan asserts that Consumers got the advantage of millions of dollars of gas cost savings as a result of the settlement and then additional savings after being released from the settlement. North Michigan claims that it expanded its exploration and production in reliance on Consumers' initial commitments.

Energy Reserves argues that the price fails to take into consideration the fact that it obtained financing based on price expectations in the settlement agreement.

Rates set by the Commission are presumed to be lawful and reasonable. Michigan Consolidated Gas Co v MPSC, 389 Mich 624; 209 NW2d 210 (1973). The party opposing the order must show by clear and convincing evidence that the order complained of is unlawful or unreasonable. MCL 462.26; MSA 22.45, Federal Armored Service v PSC, 204 Mich App 24, 27; 514 NW2d 178 (1994). The reviewing court gives due deference to the Commission's administrative expertise and will not substitute its judgment for that of the Commission. Yankoviak v Public Service Comm, 349 Mich 641, 648; 85 NW2d 75 (1957).

The standard of review of a Commission decision is whether it is lawful and supported by competent, material and substantial evidence on the whole record. Const 1963, art 6, §28.

> It is for the PSC to weigh conflicting opinion testimony of the qualified ("competent") experts to determine how the evidence preponderated. Expert opinion testimony is "substantial" if offered by a qualified expert who has a rational basis for his views, whether or not other experts disagree. [Antrim Resources v PSC, supra 179 Mich App at 620].

In this case, the Commission based its gas price determination partly on the expert testimony of Consumers' witness Michael J. Shore and Attorney General witness Ralph E. Miller. Both agreed that the benchmark price should be $2.80 per MMBtu. Shore testified that the price should be set without additional add-ons, and Miller testified that the benchmark price should serve as the maximum price.

Viewed from a broader distance, however, the rate setting, the ratemaking, is virtually unreviewable, as we recently pointed out in Abate v PSC, 205 Mich 383, 390; 522 NW2d 140 (1994):

> Setting rates and fashioning rate structures are legislative and not judicial or

quasi-judicial acts. This Court therefore does not review PSC rate decision under the substantial evidence test, but instead defers to the PSC absent breach of a constitutional standard or statutory mandate or limitation.

HERSEE APPEAL

Appellants Hersee and the Olsons raise several constitutional challenges to Act 9.

DUE PROCESS-STANDARDS

They argue that § 10 denies due process, because the electricity rate state it refers to contains standards that are meaningless in a producer's sale of gas to a common purchaser. They point out that the "just and reasonable" provision of that statute uses a return on investment approach that is impossible to apply to a producer's sale of gas to a public utility. Recognizing that, the Commission substituted a market price standard, completely without statutory authority, contrary to Union Carbide Corp v Public Service Comm, 431 Mich 135; 428 NW2d 322 (1988). Consequently, appellants conclude, § 10 of Act 9 is devoid of standards, vague and uncertain and denied them due process.

The argument is not meritorious. We rejected it in Antrim Resources v Public Service Comm, supra. There, we held that 1929 PA 9 incorporates the "just and

reasonable" test from the electricity rate statute, 1909 AP 106, giving the Commission jurisdiction to approve natural gas prices between producers and utilities. The court interpreted part of § 7 of the electricity rate act to read as follows when applied to gas sales:

> The prices [paid to producers of natural gas] shall be just and reasonable and [producer of natural gas] shall at any time be [paid] more or less than other [producers of natural gas] are [paid] for like contemporaneous service rendered under similar circumstances and conditions. [179 Mich App at 614.]

Antrim Resources pointed out that the Commission's reliance on § 10 of 1929 PA 9 as a legislative grant of jurisdiction to approve prices was entitled to respectful consideration. The Court noted that the Commission has long looked to a variety of factors in setting a reasonable and appropriate price, including "the contract pricing provisions, the cost of interstate and intrastate natural gas, past PSC-approved gas purchase prices, the cost of alternative fuels and governmentally established gas prices." 179 Mich App at 614. We noted that, despite a 1987 change in the statute, the Legislature had not amended the just and reasonable provision. This led to the conclusion that "the Legislature must have contemplated that the PSC would inspect and interpret the filed contracts to

determine if the pricing provisions were reasonable and appropriate." Ibid.

In light of Antrim Resources it is now too late for appellants to challenge the standards, set out in 1929 PA 9 and the electricity rate statute, by raising other objections to the lack of standards not specifically raised or considered in Antrim Resources.

DUE PROCESS-POLICE POWER

The Hersee appellants further argue that Act 9 is not a valid exercise of police power, because there is no public welfare consideration which can justify the state's interference with contract prices negotiated by producers. They assert that the statute is one-sided and that it grants an advantage to a common purchaser to receive a reduction in contract price. They urge that the public interest can be protected by the Commission in rate cases by controlling the utility's gas cost recovery under 1982 PA 304. They claim that there is, however, no public welfare to be served by permitting a common purchaser to escape from a contractual bargain with a producer.

It is true, as Hersee argues, that the entire cost of gas is not always passed on to ratepayers. In a general rate case or in a gas cost recovery proceeding, the Commission may disallow the cost of gas that was incurred unreasonably or imprudently. In that situation, the utility company's

shareholders, not the ratepayer, bear the excess cost.

However, it is not true that the state has no public interest in regulating gas costs. It seems axiomatic that the price a public utility pays for natural gas affects the public interest or welfare, because the utility passes on most of the cost of gas to ratepayers. Indeed, a state has significant and legitimate interests in protecting consumers from rising natural gas prices. Energy Reserves Group, Inc v Kansas Power and Light, 459 US 400; 103 S Ct 697; 74 L Ed 2d 569, 584 (1983). Hence, a gas supply contract between producers and a natural gas utility which contained a price escalation clause was held not to be in the public interest in a gas rate approval proceeding in National Fuel Gas Distribution Corp v Public Service Comm, 107 App Div 2d 357; 487 NYS2d 150 (1985); aff'd 66 NY 2d 956; 498 NYS2d 798 (1985).

EQUAL PROTECTION-ACCESS

Hersee and Energy Reserves argue that the statute denies producers equal protection. They claim that it grants common purchasers the right to seek a reduction in price, but does not give producers authority to seek a price increase. They point out that the remedy of "complaint" under § 7 of the electricity rate statute is open only to consumers, not producers. They conclude that vague references to access under other Commission statutes are inadequate; the producers' right to secure a contract

price increase should be set forth clearly and without doubt.

We agree with these appellants that no Public Service Commission statute clearly gives a producer a right to petition the Commission for an increase in gas prices. However, a producer used 1929 PA 9 without question and apparently without objection in Sullivan v PSC, 93 Mich App 391; 287 NW2d 188 (1979). As Hersee notes, Act 9 gives a common purchaser, but not a producer, the right to seek a price reduction under § 10. MCL 483.110; MSA 22.1320. Similarly, § 7(1) of the electricity rate act, to which § 10 refers for procedures, limits the complaint remedy to any consumer, city, village or township. MCL 460.557(1); MSA 22.157(1).

However, a producer has equal access to the Commission when a common purchaser applies for price approval under Act 9.

When a utility and producer agree on a contract price, they are, by definition, satisfied with the price. Ordinarily, they would live with that price until it was renegotiated. However, § 10 of Act 9 requires the utility to file the new rate with the Commission. Approval by the Commission is mandatory. Antrim Resources, supra. The approval process necessarily includes a determination that the price is just and reasonable. MCL 483.110; MSA 22.1320, MCL 460.557; MSA 22.157, Antrim Resources, supra. "Just and reasonable" requires that the price be neither too

high nor too low, neither exorbitant nor confiscatory. ABATE v PSC, 430 Mich 33, 40; 420 NW2d 81 (1988).

The determination must accommodate both a utility's request that the price be lowered and a producer's request that the price be increased. At that point, the producer, as either an interested party or a party allowed to intervene, has as much access to the Commission to seek a price increase as the utility does for the opposite purpose. Rule 101 of the Public Service Commission rules of practice, 1979 AC, R 460.17101, defines a party as a "person" who commences a proceeding or who is allowed to intervene. a "person" includes a corporation. R 460.17201 allows intervention by a person "who claims an interest in a proceeding." A producer is an interested "person" in price approval proceedings under Act 9.

Appellants also contend that they are entitled to seek a price increase at any time there is a change in circumstances, just as utilities can. We needn't decide the question, because it is not involved in this case. Consumers sought price approval for the reason that Act 9 required it. We do not rule on whether it can also seek a reduction for changes in circumstances under Act 9 or other legislation. We decide only that, when a common purchaser seeks approval of a price change under Act 9, the producers affected by the action have an equal right to present evidence and argue for a price increase.

IMPAIRMENT OF CONTRACT; DELEGATION

North Michigan also argues that the Commission's price reduction impairs its contract with Consumers, contrary to constitutional protections.

The issue was rejected in Antrim Resources v PSC, supra, 179 Mich App at 616, 617.

North Michigan maintains that Act 9, as construed by the Commission, violates the separation of powers principle, because it is an unconstitutional delegation of legislative power to an administrative agency without sufficient standards.

The point is not meritorious. Act 9 and the electricity rate statute contain sufficient standards to guide the Commission in approving a contract price, as we held in Antrim Resources, supra, 179 Mich App at 613-615.

The decision of the Commission is affirmed. Costs are not allowed, because the appeal raises questions of public interest and importance, including constitutional questions not considered before.

/s/E. Thomas Fitzgerald
/s/Marilyn Kelly
/s/George N. Bashara, Jr.

Appendix "C"

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application by CONSUMERS POWER COMPANY for Commission action under 1929 PA 9 regarding certain gas purchase contracts.	)))))))	Case No. U-10029

At the February 8, 1993 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Steven M. Fetter, Chairman
Hon. Ronald E. Russell, Commissioner
Hon. John L. O'Donnell, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On November 27, 1991, Consumers Power Company (Consumers) filed an application pursuant to 1929 PA 9 (Act 9), MCL 483.101 et seq., for Commission approval of a proposed price change and other modifications of a contract for the purchase of natural gas from certain producers. Specifically, Consumers requested that the Commission (1)

determine that $2.80 per million British thermal units (MMBtu) is a just and reasonable price under Act 9 for purchases from December 1, 1991 to March 31, 1993, (2) relieve Consumers of its purchase obligations to the extent that such purchases are found not to be a practicable source of supply for economic reasons, and (3) determine that any volumes that Consumers remains obligated to purchase at an approved price may be recovered from its gas cost recovery (GCR) customers pursuant to 1982 PA 304 (Act 304), MCL 460.6h et seq. Exhibit B to the application identified the affected producers as "North Michigan Land & Oil Corporation et al." Exhibit B showed that the current contract price was $4.375 per MMBtu and that current volumes of production were 15 million cubic feet (MMcf) per day, although production could potentially increase to 20 MMcf per day.

On March 3, 1992, Administrative Law Judge Lana Shafer (ALJ) conducted a prehearing conference. Petitions for leave to intervene by Shell Western E&P, Inc. (SWEPI) and the Residential Ratepayer Consortium (RRC) were denied. The ALJ granted leave to intervene to Attorney General Frank J. Kelley (Attorney General) and to the following holders of interests in gas production: North Michigan Land & Oil Corporation, Ron D. Markel and James W. Markel as co-trustees for The Ray D. Markel Testamentary Residual Trust B, Nielson Enterprises Corporation, Nielson Enterprises Limited Partnership, North

Michigan Gas & Oil, David E. Nielson, Dale M. Nielson, Gerald J. Talbot, and CMK Enterprises, Inc. (North Michigan); Idonea Hersee as trustee of the Idonea Hersee Trust and Dennis Olson and Sandra Olson, individually and as successor trustees of the Idonea Hersee Trust (Hersee); and Energy Reserves, Inc.[1] The Commission Staff (Staff) also appeared.

On March 9, 1992, SWEPI filed an application for leave to appeal the ALJ's denial of leave to intervene. On April 1, 1992, the Commission issued an order affirming the ALJ's ruling.

On April 2, 1992, Hersee filed a motion to dismiss Consumers' application with prejudice. On April 3, 1992, North Michigan and Energy Reserves filed similar motions for dismissal and supporting briefs. Although numerous arguments were raised, the movants' primary contentions were that Act 9 did not authorize the Commission to establish a price for intrastate gas or otherwise grant the relief that Consumers was requesting, that the Commission cannot modify the producers' contractual rights to sell gas to Consumers, that redetermining the contract price would be inconsistent with the settlement agreement approved in the Commission's August 29, 1989 order in Case No. U-8287

---

[1]The parties asserting rights to sell gas to Consumers in this case are collectively denoted as the producers or producer parties.

et al.[2] (Case No. U-8287 settlement), and that granting relief would be preempted by federal law or would be unconstitutional. On May 4, 1992, Consumers, the Attorney General, and the Staff filed responses. On May 18, 1992, the ALJ heard oral arguments on the motions. On June 29, 1992, the ALJ issued a written ruling, in which she concluded that the Commission does have authority to modify contractual pricing provisions. She further held that the Commission may not relieve a common purchaser of its obligations to purchase contractually specified volumes of gas for reasons other than preventing waste or discrimination. The motions to dismiss were denied.

On July 13, 1992, North Michigan filed an application for leave to appeal the ALJ's June 29, 1992 ruling, in which it again requested dismissal of the application. Also on July 13, 1992, the Attorney General filed an application for leave to appeal, in which he requested that the Commission reverse the ALJ's determination that Act 9 does not empower the Commission to relieve a common purchaser of its contractual obligations to purchase gas for reasons other than waste or discrimination. On July 15 and 16, 1992, Energy Reserves and Hersee, respectively, filed applications for leave to appeal, in which they concurred

---

[2]The settlement was issued for the following dockets: Cases Nos. U-8287, U-8287-R, U-8546, U-8546-R, U-8867, U-8867-R, U-9095, U-9173, and U-9222.

in North Michigan's arguments. Several parties filed responses to the applications for leave to appeal. On August 14, 1992, the Commission issued an order, in which it granted the Attorney General leave to appeal and held that Act 9 does not restrict the Commission's authority to approve a reduction in purchase obligations to situations involving waste or discrimination. The Commission denied leave to appeal to the producer parties. It indicated that the issues they raised should be addressed only after a complete record had been developed, which would enable the Commission to consider simultaneously both the jurisdictional objections and the factual merits of this case.

The ALJ conducted evidentiary hearings on August 25 through 28, 1992. On September 14, 1992, the parties stipulated to the admission of Exhibit A-35, and the record was closed. The record consists of 1,093 transcript pages and 35 exhibits. All parties filed briefs and reply briefs.

On October 30, 1992, the ALJ issued a Proposal for Decision (PFD), in which she recommended that the Commission approve a price of $3.05 per thousand cubic feet (Mcf), plus additional charges provided by contract (add-ons), for the period from the date of the Commission's final determination in this case through November 30, 1993. On or before November 13, 1992, all parties filed exceptions. On or before November 24, 1992, all parties filed replies to exceptions.

II.

FACTUAL BACKGROUND

Consumers' application invokes the Commission's regulatory authority over prices charged pursuant to a contract for the sale of intrastate gas. In this case, Consumers' obligations as buyer arise from a gas purchase contract that it signed with Amoco Production Company (Amoco),[3] which became effective on July 1, 1977.

Under the July 1, 1977 gas purchase contract (1977 contract), Amoco agreed to sell, and Consumers agreed to buy, gas produced pursuant to leased interests held by Amoco within a designated "contract area," so long as the interest were not already committed for sale by a preexisting contract. The contract area, as set forth in a map attached to the contract, covers substantial portions of Manistee, Benzie, Wexford, Grand Traverse, Kalkaska, Antrim, Crawford, Otsego, and Montmorency counties. The contract further provides that it would remain in effect until at least November 1, 1991 and thereafter would continue on a year-to-year basis, subject to cancellation by either party upon giving notice three months in advance of the November 1 cancellation date; i.e., notice must be given by August 1 of the year in which the contract was to be canceled.

---

[3]Amoco is not a party to this case.

For periods after June 30, 1978, the 1977 contract provides that purchases would be priced at the lower of a base price and an alternate price. The base price was $1.995 per Mcf as of July 1, 1978 and escalated by 5% for every six-month interval thereafter. The alternate price is set at a reported market price for No. 2 fuel oil. The determination of base and alternate prices occurs every January 1 and July 1. In addition to the purchase price, Consumers must pay designated amounts as add-ons for compression of the gas by the seller, reimbursement of a portion of certain taxes, and an adjustment for the heating value of the gas.[4]

On September 21, 1982, North Michigan Land & Oil Corporation (NMLO Corp.) and Consumers signed a ratification of the 1977 contract.[5]

---

[4]The 1977 contract expresses the price of gas on a per Mcf basis, but further provides for an adjustment to the extent that the heating value deviates from 1000 British thermal units (Btus) per Mcf. Because the gas produced pursuant to the contract generally has a heating value less than 1000 Btus, the effect of the adjustment is to reduce the overall cost per Mcf.

[5]NMLO Corp. has been designated as the spokesman for several other parties that hold production interests in joint ventures with NMLO Corp. For purposes of this order, NMLO Corp. refers only to the party that signed the September 21, 1982 ratification of the 1977 contract, and North Michigan refers to a group of producer parties, including NMLO

(Exhibit I-6.) The ratification identifies a production interest owned by NMLO Corp. in a single well in Otsego County, which it acquired from Amoco. The ratification further provides that NMLO Corp. "ratifies, confirms and joins in" the 1977 contract "insofar as it covers Seller's interest (whether now owned or hereafter acquired)" in the well and that Consumers "accepts said ratification, confirmation and joinder-in." (Exhibit I-6.) From April 1, 1983 through May 1, 1989, Consumers and NMLO Corp. signed 13 similar ratifications, each of which identifies wells, production units, or acreage acquired by NMLO Corp. and uses wording that is nearly identical to the September 21, 1982 document. (Exhibits I-7 through I-19.)

According to Consumers, it signed the 1977 contract in the belief that the arrangement would cover a diminishing supply of gas produced from Niagaran reef formations. However, the production interests held by NMLO Corp. and the other producer parties are from Antrim shale formations, and no other source of gas is presently sold under the 1977 contract. Instead of diminishing, the volumes sold began to increase steadily in the mid-1980s as the producers developed additional Antrim reserves. Production currently stands at 16 MMcf

---

Corp., that have been jointly represented in this case.

per day and is projected by the producers to reach 33 MMcf per day in 1995.

In Case No. U-8287, Consumers' 1986 GCR plan, the Staff took the position that the intrastate component of Consumers' gas supply was too costly. In its January 27, 1987 order, the Commission substantially agreed:

> "In summarizing the Commission's position on the question of Consumers' 1986 intrastate gas purchases, the Commission finds that Consumers' intrastate gas supply contracts were reasonable and prudent when executed. However, the Commission also finds that Act 304 imposes upon Consumers an obligation to take reasonable and good faith actions to renegotiate the price of intrastate gas or take other appropriate and reasonable actions whenever its current contract prices significantly exceed market prices. Consumers' 1986 GCR Plan is not reasonable and prudent, due to Consumers' failure to demonstrate reasonable actions taken to negotiate lower prices for intrastate gas or otherwise adequately explain its inability to do so." (Order, p. 18.)

This prompted Consumers to seek renegotiations of its intrastate gas purchase contracts, including the 1977 contract. In 1986, Consumers began

placing in escrow amounts representing the difference between the contractual price of intrastate gas and the incremental price of its interstate supplies.

As part of the renegotiation process, Consumers and the producers covered by the 1977 contract signed a contract amendment that became effective on January 1, 1988. (Exhibit I-20.) The contract amendment imposed a ceiling price of $2.824 per Mcf for 1988 and further provided that the ceiling would change in subsequent years to reflect movements in an index based on the average commodity cost of gas for five interstate pipelines. The amendment also provided that pricing of gas sold after November 1, 1991 would revert to the original provisions of the 1977 contract. The term of the 1977 contract was extended to November 1, 1995, subject only to the seller's right to cancel the extension by giving notice three months prior to November 1, 1991. Although the pricing provisions of the contract amendment were made contingent upon Consumers' obtaining Act 9 approval from the Commission, Consumers did not submit the amendment for the Commission's approval.

On August 29, 1989, the Commission issued an order in Case No. U-8287 et al. approving a settlement agreement signed by Consumers, the Staff, the Attorney General, the Association of Businesses Advocating Tariff Equity, the RRC, and a number of persons producing gas covered

by contracts in the Northern Michigan 1 and Southern Michigan 1 vintages, including NMLO Corp. (Exhibit I-22.) In addition to resolving certain issues relating to the recovery of the cost of intrastate purchases in GCR proceedings for 1986 through 1989, the Case No. U-8287 settlement established the following Act 9 prices: $3.050 per Mcf in 1989, $3.294 per Mcf in 1990, and $3.558 per Mcf for the first 11 months of 1991.

In Part I of the settlement, Paragraph M acknowledged that some of the producers signing the settlement had also made side arrangements with Consumers:

> "The parties to this Settlement Agreement recognize that in the settlement process, Consumers Power made agreements with individual producers which are at variance with this Settlement Agreement. The terms of the agreements with individual producers shall govern conflicts between an individual producer and Consumers if conflicts arise between those parties, but those private agreements shall not prevail over this Settlement Agreement in instances of conflicts between Consumers and non-producer parties. Consumers Power agrees that if any such variations result in an obligation to pay a producer more than this Settlement Agreement recognizes as proper

> for GCR recovery, Consumers Power shall be responsible for such excess payments without recourse to its customers." (Exhibit I-22, p. 12.)

According to the producers in this case, Paragraph M validates a contemporaneous supplemental agreement with Consumers. The terms of that agreement were stated in an August 7, 1989 letter, which was signed both by Consumers and a representative of NMLO Corp. The August 7, 1989 letter agreement (1989 private agreement) provides that Consumers would pay the producers $682,797.47 plus interest for payments previously placed in escrow, that the term of the 1977 contract would be extended without being canceled until November 1, 1995, that the price paid to the producers on and after December 1, 1991 would be the price provided by the 1977 contract, and that the 1989 agreement would be controlling with respect to any conflicts between it and the Case No. U-8287 settlement. (Exhibit I-21.)

On November 27, 1991, Consumers sent a letter to NMLO Corp. and the other producers holding rights under the 1977 contract, which notified them that it would limit the price it paid for its contract purchases to $2.80 per MMBtu as of December 1, 1991. (Exhibit I-26.) The letter indicated that the difference between the $3.558 per MMBtu price approved in the Case No. U-8287 settlement for 1991 and the $2.80 per

MMBtu price to be paid by Consumers would be placed in escrow pending resolution of an application filed pursuant to Act 9. On the same day, Consumers filed the application that commenced this case.

III.

POSITIONS OF THE PARTIES

Consumers

Consumers witness Michael J. Shore proposed that the Commission approve $2.80 per MMBtu as the price for gas purchases from December 1, 1991 through March 31, 1993. Consumers' price proposal makes no provision for paying additional amounts as add-ons. Mr. Shore testified that Consumers' proposed price was supported by the Staff's benchmark for intrastate purchases in Case No. U-9733, which is pegged to the delivered price of direct interstate purchases. Mr. Shore also testified that Consumers' proposal was consistent with prices paid to other northern Michigan producers since the Case No. U-8287 settlement agreement was approved.

In view of the increases in production since 1986, Mr. Shore further requested that the Commission establish volume limitations on Consumers' purchase obligations if the approved price would not be fully recoverable from ratepayers.

Staff

Staff witness John T. King testified that the current effective price for contact purchases is $3.558 per Mcf plus add-ons, which was the price lat approved by the Commission (in Case No. U-8287 et al.) and which should continue in effect until changed by Commission order. According to Mr. King, Consumers' proposed price of $2.80 per MMBtu is not just and reasonable. The Staff proposed instead a price of $3.05 per Mcf plus all applicable add-ons except for the heating value adjustment.

Mr. King disagreed with several aspects of Mr. Shore's testimony. Mr. King testified that the benchmark for intrastate gas cited by Mr. Shore applies only to new sources of supply, not, as in this case, to renegotiations of existing contracts. Mr. King opposed Consumers' request for volume limitations, which, in the Staff's view, would discriminate against the producers selling under the 1977 contract and could cause waste. Mr. King stated that the November 1, 1995 contract termination date provided in the 1989 agreement should be honored and that Consumers' proposed end date of March 31, 1993 for the price redetermination should not be adopted.[6] Mr. King also

---

[6]The Staff later explained in its brief that Mr. King's recommendation that the approved price should remain in effect through November 1, 1995 was premised on a belief that the 1989 private agreement was fully effective and extended the 1977

disagreed with Consumers' position that prices approved pursuant to Act 9 should be recoverable under Act 304. Mr. King explained that the two acts have different purposes and that there is no linkage between price approvals granted under the two acts, even though it is often the case that prices approved pursuant to Act 9 are recovered in Act 304 proceedings.

North Michigan

Dale M. Nielson, who testified for North Michigan, is the Executive Vice President of Nielson Enterprises Corp., which manages the operations of NMLO Corp.[7] Mr. Nielson testified that the price reductions negotiated in August 1989 represented more than $13.8 million worth of concessions by the producers. Mr. Nielson claimed that those concessions were made in exchange for the extension of the contract term until November 1, 1995 and for reinstatement of the full contract price on and after December 1, 1991. According to Mr. Nielson, the price provided by the 1977 contract was $4.386 per MMBtu (plus add-ons) as of January 1, 1992. Mr. Nielson

---

contract to November 1, 1995. The Staff's brief stated that if the Commission determines that the 1989 private agreement is not effective, the price approval should only apply to purchases made prior to cancellation of the 1977 contract, which could occur as early as November 1, 1993.

[7]Hersee adopted Mr. Nielson's testimony.

projected that the producers' revenues would diminish by $90 million from December 1, 1991 to October 31, 1995 if Consumers' price proposal were approved. Mr. Nielson further testified that volume limitations would harm the producer parties by exposing them to drainage caused by other producers taking gas from adjacent acreage.

Mr. Nielson stated that Consumers' proposal calls for relief that exceeds the Commission's jurisdiction under Act 9 and is unjust and unreasonable. He added that agreement to the prices provided by the 1977 contract was an appropriate basis for settlement in August 1989 and continues to be reasonable in light of prevailing circumstances. Thus, Mr. Nielson concluded, Consumers should be obligated to honor its contractual obligations to the producer parties and their royalty owners.

Energy Reserves

David L. Gray, President of Energy Reserves, testified that Energy Reserves' production interests under the 1977 contract were acquired on June 5, 1991. According to Mr. Gray, Energy Reserves had no knowledge of any claim by Consumers that the contract prices were subject to modification under Act 9, but it relied upon the contract extension to November 1, 1995 in acquiring its interests. Mr. Gray claimed that Consumers' decision to escrow part of the purchase price after November 30, 1991 and its price proposal in this case would

eliminate financing that Energy Reserves had been relying upon for drilling additional wells.

Attorney General

Ralph E. Miller, an independent consulting economist, testified on behalf of the Attorney General. He took two approaches to analyzing gas pricing for the period from December 1991 through October 1995: (1) he determined a reasonable price based on the assumption that no contractual obligations predating December 1, 1991 had been created by the parties, and (2) he viewed the existing contractual arrangements as the product of negotiations to compromise provisions of the 1977 contract that had proven to be unduly favorable to the producers in light of changing market conditions.

Applying his first approach, Mr. Miller stated that a reasonable price should reflect economic conditions of the gas market, which means that the price should be derived from available alternative sources of supply. For this purpose, Mr. Miller relied on the Staff's benchmark price for new intrastate supplies based on the delivered cost of direct interstate purchases and agreed with Mr. Shore that the benchmark price is $2.80 per MMBtu for 1992. Mr. Miller further testified that the benchmark should serve as a maximum price and that even lower prices should be considered if other, less costly sources of supply are available.

Mr. Miller stated that the contractual arrangement in this case contained various provisions that are less favorable than direct interstate purchases. First, Consumers' obligation to purchase the annual contract quantity, as defined in the 1977 contract, is a function of the seller's development of reserves and is therefore within the seller's complete control. Second, Consumers' annual purchase obligation is 90% of the producer's maximum delivery obligations as compared to the 75% annual purchase obligation provided in Consumers' interstate direct purchase contracts. Third, the contract provides for monthly, not daily, delivery obligations, which impedes Consumers' ability to meet peak-day demand. To compensate for these shortcomings, Mr. Miller concluded that a reasonable price under his first approach could be determined by reducing the benchmark price from $2.80 to $2.70 per MMBtu.

Turning to his second approach, Mr. Miller testified that the pricing provisions of the 1977 contract had proven to be unfavorable to Consumers by the mid-1980s, making it incumbent upon Consumers to renegotiate the price. Comparing Consumers' situation to the take-or-pay issues facing interstate pipelines about the same time, Mr. Miller stated that the Case No. U-8287 settlement provided full and fair compensation for a buy-down of the producer parties' contractual rights and that further concessions by Consumers beyond the November 30, 1991 expiration

of the settlement -- particularly the contract extension through November 1, 1995 at the full contract price -- were unreasonable. Mr. Miller concluded that, under his second approach, the price to be paid for the extended term should be based on the same market considerations that he used in his first approach. Thus, he concluded, a reasonable price under either approach would be $2.70 per MMBtu for December 1991 and for 1992.

Mr. Miller testified that his recommended price should make no additional allowance for add-ons, even though add-ons are required by contract. He also stated that the price should be further reduced for costs incurred by Consumers to have the gas delivered to its distribution system at the tailgate of the Kalkaska processing plant. Consumers' costs are for Wet Header transportation and processing, which amount to 30¢ per MMBtu. Mr. Miller therefore adjusted his recommended price to $2.40 per MMBtu.

IV.

PROPOSAL FOR DECISION

In the PFD, the ALJ initially reviewed the validity of the 1989 private agreement that the producer parties rely upon to support their claim that they are contractually entitled to sell gas at the full price provided by the 1977 contract. The ALJ determined that because the 1989 agreement was not submitted to the Commission, it was not approved for

purposes of Act 9, and any effect it may have is limited to resolving private disputes between the parties. In reaching this determination, the ALJ rejected the producers' argument that Paragraph M of the Case No. U-8287 settlement recognized the validity of private agreements and that the Commission's approval of the settlement thereby conferred approval for Act 9 purposes. The ALJ concluded instead that Section 10 of Act 9, MCL 483.110, requires that Commission approval be granted on the basis of a review of the terms and provisions of a contractual amendment and that the Commission may not waive this obligation by approving settlements with clauses like Paragraph M. According to the ALJ, the Commission's August 29, 1989 order approving the settlement indicated that the approval was not effective beyond November 1991, so that the Commission did not intend its approval to encompass a private agreement's extension of the contract term beyond 1991. The ALJ added that even if the Case No. U-8287 settlement could be construed to confer approval upon the 1989 agreement, that approval was limited and would have no effect beyond 1991.

The ALJ also rejected Energy Reserves' contention that it was a bona fide purchaser for value. She determined that Energy Reserves' decision to acquire its production interests was not made in reliance upon any representation by Consumers, was made with knowledge of the system of regulation provided by Act 9,

and was premised upon beliefs about future events, not misrepresentations of existing facts.

The ALJ next addressed the price to be approved pursuant to Act 9. Reasoning that a price determination must take into account all factors and circumstances surrounding the parties' decision to enter into settlement arrangements in August 1989, she discounted the proposals of Consumers, the Attorney General, and the producers as ignoring relevant considerations. She stated that the price proposals put forth by both Consumers and the Attorney General placed undue emphasis on market conditions. Moreover, she noted that Consumers' failure to submit the 1989 private agreement for Commission approval created much of the controversy in this case. She also faulted the Attorney General for failing to credit the producers for concessions they had already made in giving up certain contractual rights. On the other hand, she reasoned, the producers seek a windfall that ignores market considerations and fails to recognize their own role in aggravating the dispute by dramatically increasing their production levels.

The ALJ determined that only the Staff's price recommendation takes into consideration all of the relevant circumstances. She added that even though the Staff's price was not calculated in a mathematically precise manner, it does consider the effect of a price redetermination on all parties.

Therefore, she recommended that the Commission adopt the Staff's proposed price of $3.05 per Mcf, plus add-ons, as a just and reasonable price.

The next issue addressed by the ALJ was the time period for which the approved price should be placed in effect. The ALJ rejected Consumers' contention that the approved price should become effective on a retroactive basis to December 1, 1991, which is both the date that the Case No. U-8287 settlement expired and the effective date that Consumers specified on November 27, 1991 in notifying the producers of the application filing The ALJ determined that the Commission has no authority under Act 9 to establish a price on a retroactive basis. For the period running from the expiration of the Case No. U-8287 settlement (after November 30, 1991) through the date a final decision is issued in this case, the ALJ recommended that Consumers should pay the price specified in the 1977 contract, as it agreed to do in the 1989 private agreement.

The ALJ further recommended that the approved price should apply prospectively until November 30, 1993, in accordance with the provisions of the 1977 contract. Because the 1989 agreement was not submitted for Commission approval, the ALJ took the view that the agreement's extension of the contract term to November 1, 1995 was ineffective.

The ALJ recognized that the Commission has authority under Act 9 to relieve Consumers of its purchase obligations or to place volume limitations on those obligations for reasons other than waste or discrimination. However, she found that Consumers could have negotiated contractual limitations on its purchase obligations, but simply failed to do so. Under these circumstances, she reasoned, Consumers is not entitled to relief from its purchase obligations.

The ALJ further construed the 1977 contract as possibly not covering the Antrim production interest being asserted by the producer parties. According to the ALJ, the 1977 contract released Consumers from an obligation to purchase gas produced from any acreage within the contract area if no well had been completed within that acreage or within a common source underlying that acreage by the end of the contract's "initial period," which ended no later than July 1, 1980. The ALJ stated that Amoco drilled wells pursuant to the 1977 contract only in Niagaran formations and that the Antrim production now claimed by the producers was released under the 1977 contract at the close of the initial period. The ALJ therefore determined that none of the acreage acquired by the producers after the initial period remains subject to the 1977 contract.

The ALJ agreed with the Staff's argument that the formula provided in the 1977 contract for paying an add-on to the

producers as a reimbursement of their compression costs was excessive in light of costs they actually incurred. She adopted the Staff recommendation that the add-on for compression should be calculated on the basis of actual cost.

The ALJ next rejected Consumers' contention that the Commission should prohibit the producers from using any compressors, pumps, or other devices that place gas fields under vacuum. Consumers had contended that this practice is impermissible under Rule 17 of the Commission's rules governing production and transmission of natural gas, R 460.867, unless prior Commission approval has been obtained. The Staff explained that the producers are compressing gas at a central production facility to accommodate pressure requirements on the sales line. According to the Staff, compression techniques are not being used to lift gas out of the wells and therefore do not violate rule 17. The ALJ accepted the Staff's explanation.

The ALJ also rejected Consumers' argument that the Commission should exercise its authority under Section 7 of Act 9, MCL 483.107, and Rule 15, R 460.865, to provide for maximum levels of withdrawal as a designated percentage of a well's absolute daily open flow. The ALJ deferred to the Staff, which explained that open flow tests are not normally performed for wells drilled in Antrim formations due to their low flow rates. According to the Staff, such

testing would be impractical and unduly costly.

Finally, the ALJ recommended that Consumers' request for a clarification of the relationship between Act 9 and Act 304 be denied. According to the ALJ, clarification is unnecessary, given that the two acts serve distinct purposes and apply different standards. She added that approval of a just and reasonable price pursuant to Act 9 should not be viewed by the utility as an assurance of GCR recovery for Act 304 purposes.

The parties' exceptions raise issues related to the Commission's jurisdiction, which the ALJ did not address in the PFD because she had disposed of them in a written ruling issued on June 29, 1992. That ruling rejected the producers' claims that this case is barred by principles of res judicata and estoppel. Relying on Antrim Resources v Public Service Comm, 179 Mich App 603 (1989), the ALJ further held that Act 9 grants jurisdiction to the Commission to approve pricing provisions for intrastate gas purchases, including prices lower than those provided by contract.[8] The ALJ ruled that a price determination is not

---

[8]The ALJ also ruled that the Commission lacks authority to relieve a common purchaser of its contractual obligations to purchase gas for reasons other than preventing waste or discrimination. However, that aspect of her ruling was reversed in the Commission's August 14, 1992 order addressing various parties' applications for leave to appeal.

preempted by the Natural Gas Policy Act of 1978, 15 USC 3301 et seq., and that the Commission should not decide the constitutional issues raised by the producers.

V.

DISCUSSION

Act 9

In its exceptions, North Michigan renews its challenge to the Commission's jurisdiction, arguing that the Commission has no authority to lower contract prices unilaterally. North Michigan contends that Act 9 should be understood as focusing only upon the activities of public utilities and other common purchasers that serve the public. According to North Michigan, a private producer's sale of gas to a common purchaser is not conduct that is regulated by Act 9. North Michigan argues that the requirement in Section 10 of Act 9 for prior Commission approval of price changes is limited in purpose to preventing powerful utilities from discrimination among producers and does not vest the Commission with sweeping powers to lower prices otherwise provided by contract. North Michigan further contends that the Court ruling in Antrim Resources does not contradict its argument for two reasons. First, it claims, the Court held only that the Commission has authority to approve price changes called for by the contract itself and did not address whether the

Commission may establish a new price apart from the contract. Second, it argues, much of the decision is dicta.

The Commission finds that Act 9 provides a grant of authority for it to make price redeterminations for intrastate gas purchase contracts. Once an initial contract is filed, Section 10 expressly requires Commission approval before any alteration or amendment affecting the price paid, rates, charges, or conditions of service may become effective. As explained in prior Commission orders, the Commission's regulatory role is established by long-standing administrative practice dating back to the enactment of Act 9, and privately renegotiated amendments cannot override the Commission's responsibility to approve only price changes that are just, reasonable, and in the public interest. [September 29, 1987 order in Case No. U-8600, pp. 4-5, aff'd in Miller Brothers v Public Service Comm, 180 Mich App 227 (1989).]

These principles were recognized in Antrim Resources, supra, where arguments similar to those raised by North Michigan were rejected by the Court:

> "The producers argue that absent agreement by the parties to the contract as to a specific price, the PSC does not have jurisdiction to establish a price that Mich Con may pay for commonly purchased natural gas. The producers claim that the PSC

> may approve a price only when both parties to a contract submit an agreed-upon price. We disagree. The statute requires that common purchasers apply to the PSC for approval of any alterations of amendments of the price paid for natural gas. There is nothing in §10 which would lead us to conclude that both parties to a gas purchase contract must agree to a specific price before the PSC may make a determination of reasonableness." (179 Mich App 616.)

Notwithstanding North Michigan's characterization of the foregoing as dicta, the Court's reasoning was integral to its holding and is highly persuasive for purposes of resolving similar arguments raised in this case. (See also Miller Brothers, supra.) The Commission is persuaded that Act 9 authorizes it to decide Consumers' request for a price redetermination.

Hersee argues that Consumers' request for volume limitations cannot be supported by Sections 7 and 8 of Act 9, MCL 483.107 and 483.108, because those statutes are concerned with preventing waste, which has not been demonstrated in this case. This argument was addressed in the Commission's August 14, 1992 order, where the Commission determined that "Sections 5, 7, and 8 of Act 9 do not restrict the Commission's right to approve Consumers' request for a

reduction in its purchase obligation to situations involving only waste or discrimination." (Order, p. 6.) The Commission reaffirms that determination.

North Michigan next argues that the Commission's authority to grant the relief requested by Consumers is preempted by the Natural Gas Policy Act of 1978, which manifested a policy to deregulate both interstate and intrastate gas prices. To support this argument, North Michigan relies on Transcontinental Gas Pipe Line Corp v State Oil & Gas Board of Mississippi, 474 US 409; 106 S Ct 709; 88 L Ed 2d 732 (1986). In reply, the Attorney General argues that the Court revisited this issued in Northwest Central Pipeline Corp v State Corporation Comm of Kansas, 489 US 493; 109 S Ct 1262; 103 L Ed 2d 509 (1989), where it held that state regulation is preempted only if it invades a federal agency's exclusive domain. He further argues that Act 9 is not preempted when applied to gas purchase contracts operating solely on an intrastate basis because those contracts are not regulated by federal law.

In its July 8, 1980 order in Case Nos. U-5997, U-5998, U-5999, and U-6040, at page 6, the Commission held that the Natural Gas Policy Act of 1978 does not preempt the Commission's authority under Act 9 over intrastate purchases so long as the commission's action does not conflict with federal law. The Commission reaffirms that decision and finds that federal law does not preempt

it from ruling upon the application in this case. The decision in Transcontinental invalidated state regulation that was applied to an interstate pipeline's purchases. Because the production in this case in not being purchased for resale on an interstate basis, the pricing of this gas in subject to Act 9.

North Michigan next raises several constitutional issues. In so doing, North Michigan states that it does not believe that the Commission has the ability to address constitutional issues, but that the issues have been raised solely for the purpose of preserving appellate rights.

For its first constitutional issue, North Michigan argues that Act 9 violates the constitutional prohibition against impairment of contracts. Second, North Michigan argues that Section 10 of Act 9 violates the Equal Protection Clause by giving common purchasers, but not producers, the right to file an application seeking a price redetermination. Third, North Michigan argues that Act 9 provides inadequate standards for the Commission to apply in making price and volume determinations, which renders the statute void due to vagueness and violates the due process clause. In a related argument, North Michigan asserts that the lack of adequate standards means that Act 9 impermissibly delegates legislative power to an administrative agency and violates the doctrine of separation of powers.

Hersee also argues that Section 10 violates due process because it is vague and uncertain. Hersee acknowledges that Section 10 requires the Commission to treat applications for approval of contract changes "in the same manner and by the same process and under the same legal limitations and like right as are now provided by statute for the regulation by the commission of the rates for electricity transmitted in this state." (MCL 483.110.) However, Hersee states that the statutory framework for regulating transmission of electricity in 1909 PA 106 (Act 106) governs rates and other conditions of service in the context of a utility's sale of electricity to the public, which differs substantially from a producer's private sale of a commodity to a common purchaser. Thus, Hersee argues, because Act 106 serves purposes unrelated to Act 9, it cannot be relied upon to supply adequate standards for Act 9 determinations. Hersee further contends that if Act 9 is applied as a ratemaking statute, its historic purpose of protecting producers from common purchasers' discriminatory practices and preventing waste would be distorted.

Hersee raises other constitutional arguments that are similar to North Michigan's. Hersee argues that if Section 5 of Act 9 is applied as a means of imposing volume limitations on Consumers' purchase obligations it would be similarly vague and uncertain. Hersee also argues that Section 10 does not provide equal protection because it gives

common purchasers, but not producers, the opportunity to apply to the Commission for a modification of contractual prices.

In view of North Michigan's statement that it does not expect the Commission to decide its constitutional challenges to Act 9, see Wronski v Sun Oil Co, 108 Mich App 178, 187 (1981), the Commission need not address these matters at great length. However, the commission does not believe that there is any constitutional impediment to determining the issues raised in Consumers' application. First, North Michigan's contention that a grant of relief would violate the constitutional prohibition against impairing contracts has already been judicially rejected in Antrim Resources, supra, 616-617, and Miller Brothers, supra, 233. Second, Section 10 does not unfairly protect only common purchasers through its provision on price redeterminations, but it requires any change in the contractual price to be submitted for Commission approval after common purchasers, producers, and other interested parties have had a full and fair opportunity to be heard.[9] Third, Act 9 does not violate due process or impermissibly delegate legislative power. As the Court in Antrim Resources recognized, the applicable standards for reviewing contractual alterations or

---

[9]Consumers and the Attorney General contend that Act 9 incorporates Section 7 of Act 106, MCL 460.557, which gives producers a right to file a complaint seeking a price increase. That is not the present situation.

amendments are established in Act 9, as supplemented by Act 106, and have been refined by long-standing administrative practice. Moreover, the Commission administers Act 9 with contested case procedures that provide the full array of safeguards required by the Administrative Procedures Act of 1969 and the Commission's rules. Thus, Act 9 is as reasonably precise as the subject matter requires or permits and provides adequate procedural protection against arbitrary or capricious determinations. [See Attorney General v Public Service Comm, 161 Mich App 506, 510 (1987); Adkins v Department of Civil Service, 140 Mich App 202, 213-214 (1985).]

Validity of 1989 Private Agreement

In its exceptions, North Michigan takes issue with the ALJ's determination that the 1989 private agreement has not been approved by the Commission. According to North Michigan, it was not necessary for the 1989 agreement itself to be submitted to the Commission because that agreement was covered by Paragraph M of the Case No. U-8287 settlement agreement, which was approved by the Commission. Thus, North Michigan contends, the Commission's approval of the Case No. U-8287 settlement conferred Act 9 approval upon the 1989 private agreement. North Michigan maintains that because Paragraph M put the Commission on notice of the existence of private agreements, including the 1989 agreement, the Commission's acceptance of the Case No. U-8287 settlement meant that "the

Commission did not care whether the price was 'just and reasonable' as long as the ratepayers were not adversely affected." (North Michigan exceptions, p. 39.) North Michigan notes that Paragraph M did protect ratepayers' interest by providing that the excess of privately negotiated prices over settlement prices would not be passed through in GCR proceedings. North Michigan also contends that the ALJ misconstrued the Commission's order in Case No. U-8287 et al. as approving prices only for 1989 through 1991. North Michigan insists that the effect of the 1989 agreement upon prices after 1991 was not precluded by the order and that those prices became effective due to Paragraph M.

In its exceptions, Energy Reserves agrees with North Michigan's argument that the Commission's approval of Paragraph M in the Case No. U-8287 settlement amounted to approval of private agreements. Energy Reserves further argues that the Commission did in fact waive its Section 10 authority to approve the prices stated in the 1989 agreement as a result of Paragraph M.

Consumers' exceptions address the ALJ's statement that Paragraph M provides a means of resolving private disagreements between Consumers and producers that do not affect the price determinations required by Act 9 and that the parties should pursue matters covered by Paragraph M in other appropriate forums. (PFD, p. 53.) Consumers states

that these remarks are unnecessary and superfluous to the PFD's recommendations.

In its replies to exceptions, Consumers further explains that the intent of Paragraph M was to accommodate private settlements with individual producers only during the effective period of the Case No. U-8287 settlement, which ran from mid-1989 through November 1991. Consumers also relies on Part VI, Paragraph C, of the Case No. U-8287 settlement, which reserves each party's right to contest intrastate prices in and after December 1991. (Exhibit I-22, p. 27.) Consumers states that giving effect to Paragraph M beyond 1991 would amount to a waiver of statutory rights, which may be accomplished only if the waiver clause is clear and unmistakable. Consumers agrees with the Staff's contention that the Commission, in approving the settlement, limited the effect of its approval for purposes of Act 304 to a finding that no warning of possible disallowances for 1989 through 1991 should be given pursuant to MCL 460.6h(7), which indicates that neither the Commission nor Consumers intended the settlement to have consequences beyond November 1991.

In his replies to exceptions, the Attorney General argues that Paragraph M was intended to resolve Act 304, not Act 9, disputes and that it had no effect beyond November 1991. With respect to the last point, he, like Consumers relies of Paragraph C of Part VI of the Case No. U-8287 settlement and also notes similar

limiting language in Paragraph G of Part 1.[10]

Under Section 10 of Act 9, the Commission does not approve the initial price in a filed contract. However, any subsequent alterations, amendments, or changes in the "price paid, rates, charges, and conditions of service" do not take effect until the Commission grants an application for approval "in the same manner and by the same process and under the same legal limitations and like right as are now provided by statute for the regulation by the commission of the rates for electricity transmitted in this state." (MCL 483.110.) It has been held that Section 10, as supplemented by the standards provided in Act 106, authorizes the Commission to establish just and reasonable prices for purchases of intrastate gas. (Antrim Resources, supra, 609-615.) This grant of authority necessarily requires the Commission to inspect and interpret contractual pricing provisions before it may approve a price change. (Id., 611-612.) Sections 10 and 11[11] of Act 9 require that copies of gas purchase contracts be filed with the Commission, which serves to facilitate

---

[10]Paragraph G provides: "The parties do not agree that [the prices of intrastate and NOMECO offshore gas supplies specified in this Settlement Agreement] establish reasonable prices for any purpose or time period beyond the terms of this Settlement Agreement." (Exhibit I-22, p. 10)

[11]MCL 483.111.

the Commission's discharge of its responsibility to review and approve pricing provisions.

In light of this regulatory framework, the producers' contention that the Commission's approval of the Case No. U-8287 settlement also approved undisclosed provisions of an unfiled private agreement is unpersuasive. This contention gives an effect to Paragraph M that is inconsistent with Section 10. Section 10 requires the Commission to determine whether pricing changes submitted to it are just and reasonable; it does not permit the Commission to approve price changes that are known only by the parties that negotiated them.

Moreover, the producers' argument misconstrues the Case No. U-8287 settlement and the August 29, 1989 order approving it, both of which provided for price approvals for 1989, 1990 and January through November 1991. The settlement explicitly reserves to each party the right to contest intrastate prices after November 30, 1991. (Exhibit I-22, pp. 10, 27.) Neither the settlement nor the order approving it can be read to authorize undisclosed private agreements that purport to govern pricing after November 30, 1991. The Commission finds that the 1989 private agreement has not been approved pursuant to Act 9 and

that the Commission is not obligated to give effect to any of its provisions.[12]

North Michigan argues that the Commission's decision to approve the Case No. U-8287 settlement bars relitigation of the contract price under the doctrines of res judicata, collateral estoppel, or equitable estoppel. Reliance on those doctrines is misplaced. The erroneous premise of those arguments is that approval of the settlement is the equivalent of approving the 1989 agreement. Moreover, the Commission's order approving the Case No. U-8287 settlement does not have a preclusive effect on this case because the settlement was not intended to achieve a final adjudication of any issue affecting prices after November 1991,[13] In re

---

[12]Both Consumers and North Michigan claim that references in the PFD to their agreement amending the 1977 contract may have confused the January 1, 1988 contract amendment (Exhibit I-20) with the 1989 private agreement (Exhibit I-21). Both provided for price changes and for extending the 1977 contract to November 1, 1995. The distinction between the two is of no consequence for purposes of deciding this case because neither was submitted for approval to the Commission and therefore neither became effective pursuant to Act 9.

[13]Paragraph G of Part I of the Case No. U-8287 settlement provides that the settlement "represents a compromise among the parties and does not represent an agreement in principle on any issue," that the settlement and any order adopting it "shall

Koernke Estate, 169 Mich App 397, 400 (1988), and because a settled case resolves issues by the parties' consent instead of through litigation, VanPembook v Zero Manufacturing Co, 146 Mich App 87, 102-104 (1985).[14] Nor can North Michigan justifiably claim estoppel on the theory that it relied to its detriment on Consumers' signing the 1989 private agreement. As stated in Antrim Resources:

> "Producers who enter into contracts with common purchasers are charged with the knowledge that they are subject to the jurisdiction of the PSC to the extent that the pricing provisions in their contracts with common purchasers and any alterations or amendments in the

---

not be cited or used as precedent in any other proceeding unless clearly stated otherwise" in the settlement, that the settlement "does not limit any party's right to adopt different positions on similar issues in other administrative and/or related judicial proceedings," and that the settlement "does not reflect any admission of liability by any party." (Exhibit I-22, p. 10.)

[14]See also Pennwalt Corp v Public Service Comm, 166 Mich App 1, 7-9 (1988). The Court held that the doctrines of res judicata and collateral estoppel are not strictly applicable in rate cases or other types of legislative proceedings conducted by the Commission.

price are subject to PSC approval." (179 Mich App 612.)

In its exceptions, Energy Reserves challenges the ALJ's finding that Energy Reserves did not act reasonably in relying on its expectation that Consumers would fully perform the obligations stated in the 1989 agreement. Energy Reserves explains that this expectation was a basis for its decision to purchase its interests in Antrim production in June 1991 and that the prices provided by the 1989 agreement were the basis upon which it obtained financing.

The Commission agrees with the ALJ that Energy Reserves cannot justifiably claim a reliance interest in the 1989 private agreement. To reiterate the Court's statement in Antrim Resources, producers' interests in contracts with common purchasers are subject to the Commission's jurisdiction under Act 9. Therefore, the Commission's obligation to evaluate whether an amendment or alteration to a contract effects a just and reasonable price cannot be avoided by private agreements, and a person purchasing an interest as a seller under a preexisting contract cannot reasonably disclaim prior knowledge of the regulatory requirements imposed by Act 9.

Price

In its exceptions, Consumers argues that the ALJ erred in adopting the Staff's price of $3.05 per Mcf instead of the company's proposed price of $2.80 per

MMBtu. Consumers contends that the stated reasons for rejecting Consumers' proposal are incorrect. According to Consumers, its price was not based solely on market prices; it exceeded the price of some of Consumers' supply alternatives. Consumers further contends that the ALJ should not have discredited its proposal because it reduced the price below prices approved in the Case No. U-8287 settlement, given that those prices, having been negotiated in 1989, were predicated on the ultimately incorrect assumption that market prices would rise from 1989 through 1991. Consumers further states that the ALJ should not have faulted the company for failing to submit the 1989 private agreement for Act 9 approval because that agreement did not vary prices in any manner inconsistent with the Case No. U-8287 settlement prior to December 1, 1991. Until then, Consumers claims, an Act 9 application would have been premature.

Consumers next addresses the Attorney General's proposal, which was similar in theory and close in amount to its own. Consumers argues that the ALJ erroneously criticized the Attorney General's analysis as more appropriate for an Act 304 case. Consumers argues that the recoverable cost of its intrastate purchases, as determined in an Act 304 case, is a relevant consideration in an Act 9 case. Consumers also contends that the Attorney General cannot be faulted for giving insufficient consideration to the pricing mechanism

provided by contract because all parties were aware that Act 9 approval was an implicit condition of the pricing provisions and that approval would be withheld if contract prices departed significantly from market prices.

Finally, Consumers criticizes the Staff's approach for failing to quantify the effect of various prices upon the parties. Consumers also notes that the Staff's proposal for a different price for purposes of GCR recovery in Case No. U-9977-R (Consumers' GCR reconciliation for January through March 1992) creates uncertainty regarding when the Staff's Act 9 and Act 304 recommendation will converge. Consumers criticizes the lack of detail supporting the ALJ's recommendation adopting the Staff's proposed price.

The Attorney General criticizes the Staff's position as not having an objective basis in evidence. He claims that the most that can be said for the Staff's price is that it falls between explicitly justified prices proposed by the producers, on one hand, and Consumers and the Attorney General, on the other hand. In contrast, the Attorney General says, his price proposal of $2.40 per MMBtu takes into account all relevant circumstances, as amply demonstrated by Mr. Miller's testimony. According to the Attorney General, Mr. Miller thoroughly analyzed the market price of available alternative sources of supply, compared each type of cost of producing the gas with similar costs of available

alternatives, and concluded that the contract price was far in excess of a just and reasonable price. According to the Attorney General, the producers demand a price that would produce $90 million of revenues in excess of current market prices from 1991 through 1995 in exchange for making only $13 million worth of price concessions from 1989 through 1991. He further contends that, even after making concessions, the producers continued to enjoy above-market prices during the Case No. U-8287 settlement period. The Attorney General concludes that $2.40 per MMBtu should be adopted by the Commission as a just and reasonable price.

In its exceptions, North Michigan concurs with the ALJ's rejection of Consumers' and the Attorney General's proposals as too low, but it further argues that the ALJ erred in adopting the Staff's proposed price of $3.05 per Mcf plus add-ons. North Michigan argues that this proposal cannot be viewed as just and reasonable because it does not reflect the producers' entitlement to the full contract price. According to North Michigan, it is not clear how Staff witness Mr. King determined his proposed price, but that price includes only a third of the difference between the full contract price on December 1, 1991 and Consumers' proposed price.

North Michigan argues that, not only is the Staff's price arbitrary, but it also reflects an improper assessment of the equities. According to North

Michigan, the producers did not, as stated by the ALJ, "work at break-neck speed [to] increas[e] their production levels" during their ongoing dispute with Consumers over Act 9 pricing (PFD, p. 56), but rather the rate of increase in annual volumes of production had decreased from 100% from 1986 to 1989 to 33% from 1989 to 1992. North Michigan claims that payment of contract prices would not confer a "windfall" upon the producers (id.), but would only enable them to realize what they bargained for when they made $13.8 million in concessions in the Case No. U-8287 settlement.

In its exceptions, Energy Reserves argues that the ALJ's finding that $3.05 per Mcf is a just and reasonable price was made without clear standards and is therefore arbitrary, capricious, and violative of due process.

In its replies to exceptions, Consumers states that the Attorney General's proposed price of $2.40 per MMBtu is the best choice on the record and that its own proposal of $2.80 per MMBtu is acceptable because it provides only a modest premium over market prices. Consumers argues that North Michigan's proposal is contrary to Consumers' own purchasing preferences, which seek to achieve a reliable, low-cost supply mix.

Because Section 10 of Act 9 incorporates the just and reasonable standard that governs electric rate proceedings, Consumers argues, the seller

in an Act 9 case should attempt to justify its rates by showing its costs. Consumers argues that North Michigan failed to do so, but relied instead on the simplistic, but erroneous, assumption that a price set by a private contract should control the Commission's determinations under Act 9. Consumers concludes that the contract prices are attributable to an antiquated price structure that has no relevance to prices provided in current contracts.

In his replies to exceptions, the Attorney General argues that the producers' reliance on the contract price ignores relevant market considerations. He argues that even if, as the producers state, the rate of increase in production sold under the contract has declined since 1989, the increase in volumes of production continues to be significant. He concludes that if the producers receive contract prices for increasing volumes of production, they will in fact obtain a windfall.

In its replies to exceptions, North Michigan contends that it was erroneous for Consumers to suggest that Act 9 requires a periodic redetermination of contract prices in light of market fluctuations. Otherwise, North Michigan asks, what is the point of having a contract? Moreover, North Michigan claims, if market prices rise above contract prices, none of the other parties in this case would support the producers' request for an upward adjustment of the contract price. North

Michigan also states that Consumers is currently purchasing intrastate gas from Muskegon Development Company at $3.43 per Mcf (or $3.68 per MMBtu), which is well above the Staff's proposed price. North Michigan argues that the Attorney General's analysis based on prices of available alternatives is inappropriate for evaluating an existing contract. North Michigan contends that the Attorney General ignores the below-market prices that were provided by the 1977 contract throughout the 1980s and the substantial price concessions that were incorporated into the Case No. U-8287 settlement.

North Michigan also challenges the proposal of both Consumers and the Attorney General to eliminate any amounts paid as add-ons to the approved price. North Michigan argues that this position was not put forward until Consumers witness Mr. Shore was cross-examined and that raising the issue in this manner is an untimely attempt to amend the application. Energy Reserves agrees with North Michigan and further argues that the failure to raise this issue prior to the hearings violates dues process.

In its replies to exceptions, the Staff states that only its proposal considers all circumstances, including contract price provisions, the cost of available alternatives, and previous prices approved by the Commission. The Staff believes that its proposal achieves an equitable sharing of the economic hardships required to adjust the 1977 contract price. The Staff states that

the contract presently imposes prices that are so far in excess of market prices that they cannot be considered just and reasonable. The Staff further contends that the ALJ correctly assigned some of the blame for the excessive contract price to Consumers for failing to negotiate market-out clauses as a protection against lower-than-expected market prices and for failing to seek timely Act 9 approval of the 1989 agreement.

In making a price redetermination, the Commission will not give effect to the undisclosed provisions of the 1989 private agreement. Because that agreement was not approved pursuant to Section 10, it cannot create legal rights, as already discussed in this order. Given the regulatory requirements of Act 9, the producers' claim that the Commission should honor their reliance on the agreement as a matter of equity is not reasonable.

Both the producers and Consumers urge the Commission to make a price redetermination on the basis of equitable considerations that, they claim, bolster their positions. The Commission finds little merit in this approach. None of the parties to the contract can fairly claim to have acted above reproach in negotiating and implementing the 1989 agreement, which purported to extend the 1977 contract well beyond the November 1, 1991 cancellation date at prices well above market prices. No one sought regulatory approval of the post-November

1991 consequences of the 1989 agreement until the Case No. U-8287 settlement was approaching its expiration. Consumers delayed filing the application in this case until four days prior to the expiration. At the same time, the producers have insisted that the contract price need not bend at all to the realities of the market and have expanded their production to extract the maximum advantage from their negotiated premium over market prices. The Commission is unable to find that either Consumers or the producers have a rightful claim to occupy a superior equitable position.

The Commission also does not find the pricing provisions of the 1977 contract to be a suitable basis for making a price redetermination. Regardless of whether that contract was reasonable when initially agreed upon, it is predicated upon assumptions that are no longer valid under current market conditions. If the producers' contention that the contract should prevail from now to November 1, 1995 were given effect, the consequences would be excessive costs paid by Consumers as a common purchaser. In turn, those costs would be potentially detrimental to ratepayers to the extent that rates and conditions of utility service were affected. The Commission is unable to find that requiring a common purchaser to pay a price bearing little, if any, relationship to the current market is consistent with the public interest.

In making past pricing redeterminations under Section 10, the Commission has given much weight to prevailing interstate prices. Thus, in its March 15, 1988 order in Case No. U-8600, the Commission observed that "the incremental cost of interstate natural gas is an appropriate benchmark because it is from that source that the most logical replacement for intrastate natural gas would be procured." (Order, p. 4.) Consistent with this approach, the Commission finds that the interstate market should be a primary consideration in determining a just and reasonable price for purchases under the 1977 contract. Moreover, the current policy of the Commission, as stated in the September 25, 1991 order in Case No. U-9733, is that new intrastate supplies should be pried at a competitive benchmark no higher than the cost of direct interstate purchases coupled with firm transportation. Although this case does not involve a new contract, a common objective in both contexts is to foster a convergence of market and intrastate prices. That objective can be furthered by looking to interstate prices as a guide for price redeterminations.

The proposals of both Consumers and the Attorney General rely on interstate market prices. Mr. Shore testified that Consumers' proposed price of $2.80 per MMBtu is in line with the average delivered cost of its direct interstate purchases and that it slightly exceeds the incremental delivered cost of interstate pipeline supplies. (Tr. 181-

182, 196-197.) The Attorney General's proposed price discounts interstate prices in light of Mr. Miller's testimony that certain aspects of the 1977 contract are less favorable than comparable arrangements for purchasing gas in interstate markets. This suggests that a truly market-based proposal would be somewhat lower than $2.80 per MMBtu.

The Commission finds that the price for gas purchased under the 1977 contract should be $2.80 per MMBtu, with no further provision for add-ons. This price not only recognizes the predominant influence of available alternatives in the interstate gas market, but also provides a modest premium over interstate prices. In providing this premium, the Commission recognizes that production of intrastate gas provides some benefit to the Michigan economy and has in the past proven to be a secure source of supply in Consumers' portfolio.

Several other considerations also support a price of $2.80 per MMBtu. First, as Mr. Shore testified, $2.80 per MMBtu is equal to or more than most intrastate prices for comparable contracts.[15] (Tr. 183. See Exhibit

---

[15]A notable exception is Consumers' gas purchase contract with Muskegon Development, which provides a 1992 price of $3.431 per Mcf. This price was reached by agreement in 1989 and was approved in the Commission's December 21, 1989 order in Case No. U-9527. Unlike the contractual arrangement in this case, the Muskegon Development contract is

I-4.) Second, Mr. Shore testified that the price is comparable to the price of No. 6 oil, which is the type of fuel normally used as an alternative to natural gas.[16] (Tr. 184, 204.)

Prospective Period for Approved Price

Several of the parties suggested that the price approved in this case should be subject to an expiration date. The ALJ recommended that the approved price should be effective from the date of the Commission's order until November 30, 1993. She apparently reasoned that because the 1989 private agreement was not approved, the "original contract termination date of November 30, 1993" remains in effect. (PFD, p. 58.) In its exceptions, Consumers notes that the 1977 contract provided that it may be canceled by either party on November 1 in 1991 or

---

subject to a regulatory-out clause.

[16]In prior orders, the Commission has stated that comparisons with gas prices previously approved by the Commission and other governmentally-established prices may be considered as well. [February 23, 1989 order in Case No. U-8918, p. 8, aff'd in Antrim Resources v Public Service Comm, 186 Mich App 668 (1991). See also Antrim Resources, supra, 179 Mich App 614-615.] However these considerations do not appear to have much probative value on this record. The Commission has not approved any price in a contested case since the Case No. U-8287 settlement. Evidence of other governmentally-established prices was not introduced.

any year thereafter, which means that the premise of the ALJ's recommendation -- a November 30, 1993 cancellation date -- appears to be incorrect. The Staff's exceptions indicated that no party exercised its opportunity to cancel the contract on November 1 in 1991 or 1992 and that the earliest termination date as of now is November 1, 1993. It appears that the ALJ may have inadvertently specified November 30, rather than November 1, as the cancellation date. As things now stand, November 1, 1993 represents the first available opportunity for either Consumers or the producers to cancel the 1977 contract under its own terms.

The producers' insistence upon an extension of the contract to November 1, 1995 is unreasonable. As already discussed, the 1989 private agreement was not approved by the Commission, and its provision for a firm extension of the 1977 contract is inoperative. Therefore, the provisions for cancellation in the 1977 contract are controlling.

The Commission finds that it is not necessary at this time to establish a termination date for the approved price of $2.80 per MMBtu, which shall remain in effect until changed by Commission order. Because the 1977 contract is effective on a year-to-year basis and may be canceled by any party, the buyer or seller may unilaterally cancel the contract if the approved price should cause a hardship to either in light of changes in the market or other conditions. The Commission

expects that Consumers will act reasonably and prudently to protect GCR customers' interests in deciding whether to invoke the cancellation provisions.

Retroactive Period

Consumers argues that the Commission's approved price should be retroactive as well as prospective in its effect. Consumers requests that the price take effect as of December 1, 1991, which is the date it specified in notifying the producers of its request for a price redetermination. Consumers further argues that because its notice was given within days of the filing of its application, the producers had no right as of December 1, 1991 to rely on a previously negotiated pricing mechanism. Consumers thus excepts to the ALJ's determination that the Commission lacks the authority to establish a just and reasonable price on a retroactive basis and argues that the Commission routinely approves settlement agreements pursuant to Act 9 that take effect prior to the order. Consumers also takes exception to the ALJ's conclusion that the full price provided in the 1977 contract should prevail from December 1, 1991 until today's order and argues that the Staff's proposed price of $3.558 per Mcf would be preferable if the price redetermination is not retroactive.

In its exceptions, the Staff states that its recommended price of $3.558 per Mcf plus add-ons for the period prior to the date of this order is based on its

understanding of Act 9, which obligates a common purchaser to continue paying the most recent approved price. The Staff takes the view that the most recent price is $3.558 per Mcf, which was approved in Case No. U-8287 et al. and should remain in effect until changed by Commission order. The Staff argues that the ALJ erred in finding that there was no approved price as of December 1, 1991 and that the full price provided by the 1977 contract became effective by default. According to the Staff, the ALJ's conclusion would amount to a price change, which cannot become effective until it is approved by the Commission.

In its replies to exceptions, North Michigan argues that Commission approval of the producers' right to the full contract price was secured by Paragraph M of the Case No. U-8287 settlement. North Michigan states that, by merely giving notice of an application for a unilateral price reduction, Consumers cannot avoid its obligation to pay the contract price. North Michigan also argues that the Staff's contention that no price change was approved prior to December 1, 1991 is incorrect, given that Paragraph M had the effect of changing the price.

In general, an approved price under Act 9 is not given retroactive effect. [See February 23, 1989 order in Case No. U-8918, p. 15, aff'd in Antrim Resources v Public Service Comm, 186 Mich App 668 (1991).] As a matter of long-standing practice, the last price approved by the Commission continues in effect until an

order approving a price change is issued. These principles are based on the provisions of Section 10 that require a common purchaser to "file with the commission a schedule of the rates and price at which [it] will receive gas" and that make changes in the "price paid, rates, charges, and conditions of service" contingent upon "application to and approval by the commission." Although there may have been instances in which retroactive approval was granted when the price was uncontested or was implemented pursuant to a settlement (see Antrim Resources, supra, 186 Mich App 670), that is not the case here. Accordingly, the Commission finds that Consumers' request for a price redetermination effective as of December 1, 1991 must be rejected.

Although the producers have insisted that the effective price after November 1991 reverted to the price specified by the 1977 contract, that argument relies on provisions in the 1989 private agreement. As already discussed, the 1989 agreement has not been approved by the Commission and therefore creates no legal rights. Viewed in this light, the producers' attempt to invoke the 1977 contract's pricing provisions is inconsistent with the Act 9 requirement that a price change does not become effective until it is approved by the Commission. The Commission finds that the price of $3.558 per Mcf plus add-ons was the last price approved in Case No. U-8287 et al. and remains in effect from December 1, 1991 until today.

Compression Reimbursement

The 1977 contract obligates Consumers to pay an add-on for costs incurred by the seller in providing compression of the gas. The amount of the reimbursement is 6¢ per Mcf for each stage of compression, plus 2% of the contract price of the gas for each stage of compression, plus an annual escalation of 0.4¢ per Mcf. (Exhibit I-5, p. 27.) The ALJ acknowledged the Staff's contention that the contract's compression formula presently reimburses the producers in greater amounts than their actual costs. The ALJ recommended that the Commission reduce the compression add-on to reflect actual costs. Consumers, North Michigan, and Energy Reserves take exception.

In light of its determination to approve a price that makes no extra provision for add-ons, the Commission need not separately address the issue of compression reimbursement. However, the Commission rejects the producers' contention that the Commission has no authority to make a price redetermination affecting the amount of the compression add-on. The authority granted in Section 10 to make price redeterminations includes the power to determine the full price to be paid, whether with add-ons or not.

Acreage Committed under Contract

One issue identified in the PFD as potentially affecting Consumers' obligation was whether the 1977 contract encompasses the acreage claimed by the producer parties. As a matter of contractual interpretation, the ALJ held that only acreage committed for production and sale to Consumers at a time ending no later than July 1, 1980 was covered by the contract and that all other interests held by the producers were automatically released from commitment at that time. The ALJ's determination means that at least some of the acreage described in the various ratifications signed by NMLO Corp. and Consumers between 1982 and 1989 had not been committed within the meaning of the contract. This in turn would reduce the volumes Consumers is presently obligated to purchase.

The 1977 contract provides for committing acreage with respect to two separate periods: First the initial period commencing on July 1, 1977 and expiring on July 1, 1979, which could have been extended to as late as July 1, 1980 if laws or orders issued by regulatory authorities delayed the completion of wells then being drilled. (Exhibit I-5, p. 3.) Second, the remainder of the contract term, which commenced with the expiration of the initial period and runs until the 1977 contract is canceled on or after November 1, 1991. For the initial period, the contract obligates the seller to commit

all acreage within the contract area encompassing specified parts of nine counties in the northwest and north central lower peninsula. For subsequent periods, the contract provides that the seller would commit the following acreage: (1) production units in which producing wells were completed or were being drilled at the end of the initial period and (2) areas adjoining or in the immediate vicinity of completed production units so long as the underlying acreage was deemed in the seller's best judgment to be part of a common source of supply with the acreage underlying wells drilled during the initial period. (Id., p. 7.) The contract further provides that all of the seller's acreage not covered by the foregoing provisions at the end of the initial period would be automatically released from commitment and from all provisions of the contract. (Id., p. 8.)

The producers claim a contractual right to sell gas produced from production interests described in the 14 ratifications that NMLO Corp. and Consumers signed from 1982 to 1989. The validity of their claim depends in part upon the meaning assigned to a clause included in the ratifications, which provided:

> "Seller hereby ratifies, confirms and joins in said Gas Purchase Contract insofar as it covers Seller's interest (whether now owned or hereafter acquired) in gas which may have

> been or which may be produced from the above recited well[, acreage, or unit]." (Exhibit I-6.)

Mr. Nielson contended that the producers acquired their rights when NMLO Corp. signed the first ratification with Consumers on September 21, 1982, even though the contract's initial period had clearly expired by that time. The ALJ implicitly rejected this contention and reasoned instead that the expiration of the initial period marked the end of the producers' right to develop additional gas reserves for sale under the 1977 contract.

In its exceptions, North Michigan argues that the ALJ's determination is erroneous for several reasons. First, North Michigan argues that the record does not establish the specific acreage that was committed during the initial period.

Second, North Michigan claims that the ALJ's analysis ignored the provisions in the ratifications that added the described acreage to the scope of the 1977 contract by reciting that the acreage "lies within the area covered by said Gas Purchase Contract." (See Exhibit I-6.)

Third, North Michigan raises several procedural objections. North Michigan argues that the Commission does not have the statutory authority to nullify the ratifications as a matter of contractual

interpretation or to determine which acreage is subject to the contract, particularly in light of the absence of any request for this type of relief in Consumers' application. North Michigan further argues that Consumers' purchases of gas pursuant to the ratifications estop it from claiming that the producers do not have valid rights. North Michigan observes that the issue of whether the contract covers the producers' interests was raised on an untimely basis by the Staff and the Attorney General, neither of which, it says, has standing to raise this issue.

Fourth, North Michigan claims that all of its production interests are Antrim gas and therefore qualify as a common source of supply that was committed during the initial period. North Michigan also states that the 1977 contract gives the seller an option to add acreage outside of the contract area so long as the seller delivers the gas to the contract area at its own expense.

In its replies to exceptions, Consumers argues that the ALJ correctly concluded that some of the production interests are not in fact covered by the contract. Consumers concedes that certain acreage was committed by Amoco during the initial term, including acreage in the production unit described in Exhibit I-6, the first ratification signed by NMLO Corp. and Consumers. In light of this fact, Consumers states that the ALJ's conclusion that "no acreage acquired after the initial period is

subject to the contract" should be qualified by adding the phrase, "unless it remained committed thereto at the end of the initial period." (PFD, p. 61; Consumers replies to exceptions, p. 13.)

Consumers argues that it is not estopped by its past conduct from arguing that the 1977 contract does not cover all of the production interests because its prior purchases were made on terms approved by the Commission, because the Commission cannot be bound by the company's current or past purchasing practices, and because intervenor parties, not Consumers, raised issues related to acreage. Consumers also argues that the erroneous belief of the parties signing the ratifications regarding the extent of the covered acreage is a mutual mistake of fact, for which rescission is an appropriate remedy under contract law.

Consumers contends that North Michigan also misconstrues the provision of the 1977 contract that grants the seller an option to add acreage. Consumers contends that this clause applies only to acreage located outside of the contract area, but that the acreage in question is located inside the contract area. Consumers further contends that NMLO Corp. did not ratify the contract entirely, but only "insofar as it covers Seller's interest (whether now owned or hereafter acquired)" in the acreage described in the ratifications.

The Staff replies to the producers' exceptions by stating that a ratification only adopts the provisions of the earlier contract and cannot correct defects or modify terms of the original contract.

In his replies to exceptions, the Attorney General states that North Michigan introduced the contracts as exhibits and put forward testimony that Consumers had a contractual obligation to purchase gas from the producers. He argues that this evidence created a basis in the record for determining which acreage is covered by the 1977 contract, that the issue was implicitly raised in the request for volume limitations in Consumers' application, and that any variance between the evidence and the application should be waived. The Attorney General also argues that the Commission has the statutory power to address acreage-related issues as part of its Act 9 authority to interpret gas purchase contracts.

The record developed in this case does not facilitate a precise determination of which acreage was committed under the 1977 contract. Although Consumers and North Michigan have both attempted to supplement the record with addition facts,[17] the

---

[17]Consumers lists five wells that were completed by Amoco during the initial period. (Consumers replies to exceptions, p. 13 and Attachment A.) In response to the ALJ's statement that Amoco drilled wells in Niagaran reef formations only (PFD, p. 61),

evidence itself does not shed light on the status of specific wells, production units, or acreage as of the expiration of the initial period.

Moreover, the parties' intent in signing the ratifications cannot be readily discerned from the documents themselves, and there is little evidence outside of the documents to explain what was intended. Thus, it is unclear whether the ratifications should be construed to mean that the producer parties acquired no grater rights than those held by Amoco during the initial period or whether the ratifications were intended to commit additional acreage that was developed after the initial period.

Given the limitations of the record, the Commission finds that the most telling indicator of the intent of the parties was their own conduct. Since 1982, the producers have delivered for sale, and Consumers has purchased, gas produced from the acreage described in the ratifications on the basis of their apparent shared belief that it was covered by the 1977 contract. There is nothing to indicate that this practical construction of the parties' contractual arrangement was controversial until others raised the issue during the hearing in this case. In instances where

---

North Michigan states that Amoco reentered a Niagaran well and recompleted it as an Antrim well during the initial period. (North Michigan replies to exceptions, p. 41.)

language used in a contract is equivocal or ambiguous, the practical meaning that the parties have assigned to the language by their long-standing conduct or practices may provide a strong indication of what was intended. [Glenwood Shopping Center Limited Partnership v K mart Corp, 136 Mich App 90, 100 (1984).] In light of this practical construction, the Commission finds that the acreage, production units, and wells described in the ratifications (Exhibits I-6 through I-19) were committed under the 1977 contract.

Rules 15 and 17

Consumers challenges several practices of the producers as violating Commission rules. First, Consumers contends that the producers are not complying with Rule 15(1) of the Commission's rules governing production and transmission of natural gas, R 460.865(1), as well as Section 7 of Act 9, both of which limit withdrawals on the basis of a specified percentage of absolute daily open flow. Second, Consumers contends that the producers' use of artificial lift violates Rule 17, R 460.867, which requires Commission approval before any gas well, pool, or field may be placed under vacuum by the use of compressors, pumps, or other devices.

The Commission declines to make findings regarding whether these practices are improper. Issues relating to Rules 15 and 17 are not strictly

within the purview of this application, which focuses upon proposed alterations or amendments to the contractual relationship between Consumers and the producers. Because the parties may not have been on notice that the propriety of practices used to produce gas would be at issue, the record does not lend itself to making this type of finding. However, this non-ruling does not prejudice Consumers' right to pursue its concerns by filing a complaint or by pursuing other remedies.

Volume limitations

Consumers argues that the Commission, acting pursuant to Sections 5 and 8 of Act 9, should place limits on the volumes that Consumers is obligated to purchase if a price above $2.80 per MMBtu is approved. The Attorney General agrees in principle with Consumers' argument and further argues that Consumers' otherwise open-ended purchase obligations are entirely controlled by the seller's decisions to increase production, so that the contract lacks mutuality. In the Commission's view, volume limitations are not necessary at this time, given that an approved price has been established in line with market prices. Moreover, the Staff opposed volume limitations and other types of production constraints because Antrim wells have low flow rates. Mr. King stated that volume limitations could cause waste and could harm the producers covered by the 1977 contract by enabling other producers to drain the fields.

Relationship between Act 9 and Act 304

Consumers agrees with the statement in the PFD that prices paid under Act 9 should generally be passed through for Act 304 purposes. However, Consumers argues that this does not go far enough and that the Commission should further state that it cannot reasonably approve a price for Act 9 purposes that it does not view as reasonable in an Act 304 proceeding. Consumers further contends that changes in circumstances occurring since a price has been approved under Act 9 should not result in a GCR disallowance.

The Commission addressed the relationship between Act 9 and Act 304 in its March 28, 1991 order in Case No. U-9650. It concluded there that the two statutes are materially different. The Commission observed that Act 9 focuses upon the fairness of a particular contract between a common purchaser and its suppliers and that Act 304 serves an entirely distinct purpose by providing a mechanism for the Commission to review the reasonableness and prudence of a public utility's overall gas procurement practices in light of alternative sources of gas and other factors. Given these different purposes, the Commission concluded that "the Legislature did not intend that cases arising pursuant to Act 9 should control decisions made pursuant to Act 304" and that "price approvals previously granted by the Commission pursuant to Act 9 . . . should not be

used as a substitute in an Act 304 proceeding." (Order, pp. 26, 27.)

The Commission remains persuaded that its pronouncements regarding the relationship between Act 9 and Act 304 in Case No. U-9650 are correct and sees no need to expand upon them. Consequently, Consumers' request for assurance that a price approved pursuant to Act 9 will be recovered from GCR customers cannot be provided in a non-GCR proceeding.

Motions To Strike

In the PFD, the ALJ issued a ruling granting in part Consumers' motion to strike portions of North Michigan's reply brief. In its exceptions, North Michigan contends that the ALJ's decision to strike six references was erroneous.

The Commission finds that the ALJ properly struck two of six references from the reply brief. First, the ALJ properly struck a reference on page 16, which indicated that North Michigan's conduct in settlement negotiations demonstrated that it was not being greedy. The parties' settlement negotiations were not detailed on the record, and evidence of the negotiations would not have been helpful in deciding the issues raised by the application. Second, the ALJ properly struck Exhibit H, which sets forth North Michigan's calculations of its projected revenues based on various scenarios. Several of the assumptions used in the calculations were either not supported on the record

or were not specifically attributed to evidence in the record. [See R 460.17339(3).]

The Commission finds that the ALJ should not have stricken the reference on page 27 to federal policy, as reflected in a federal tax credit. It is permissible to argue about references to federal law, which need not be formally admitted into evidence.

The Commission finds that the ALJ should not have stricken the last three references, which are found on pages 34, 44 to 45, and 50. Whether or not North Michigan's contentions are correct, the stricken references are within the permissible bounds of fair comment on the evidence or matters properly placed in issue.

On December 4, 1992, Consumers filed a motion to strike portions of North Michigan's replies to exceptions. According to the motion, certain references stricken by the ALJ from North Michigan's reply brief had been repeated in North Michigan's replies to exceptions. On December 7, 1992, North Michigan filed a response to the motion.

Consistent with the Commission's rulings on references stricken by the ALJ, the Commission will strike the following portions of North Michigan's replies to exceptions: (1) the reference on pages 6 to 7 to settlement negotiations, and (2) the reference on

pages 15 to 16 to Exhibit H of North Michigan's reply brief.

In its exceptions, North Michigan argues that Attachment A to Consumers' reply brief should have been stricken. Attachment A is a copy of a complaint filed in circuit court. The Commission agrees that Attachment A should be stricken as an improper attempt to supplement the record.

Although the Commission has examined the requests to strike portions of various briefs that were raised in North Michigan's exceptions and in Consumers' motions to strike, the Commission does not find that any of the references could materially affect the findings and conclusions reached in this case. The challenged references are mostly argumentative and have no evidentiary value. To the extent that any of the arguments are impermissible, they have not been taken into account.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 et seq.; 1929 PA 9, as amended, MCL 483.101 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, R 460.17101 et seq.

b. The 1989 private agreement was neither submitted to nor approved by the

Commission pursuant to Section 10 of Act 9, MCL 483.110.

c. The price proposed by Consumers of $2.80 per MMBtu, with no additional allowance for add-ons, is just, reasonable, appropriate, and in the public interest, and should be approved on a prospective basis.

d. The price for Consumers' purchases of gas under the 1977 contract from December 1, 1991 to the date of this order should be the last price approved in Case No. U-8287 et al., which is $3.558 per Mcf plus add-ons.

e. Volume limitations on purchases under the 1977 contract are not necessary in light of the present circumstances.

THEREFORE, IT IS ORDERED that:

A. For purchases under the July 1, 1977 gas purchase contract, the price of $2.80 per million British thermal units, with no additional allowance for add-ons provided by the contract, is approved on a prospective basis as just, reasonable, appropriate, and in the public interest.

B. Consumers Power Company is obligated to pay the last price approved in Case No. U-8287 et al., which is $3.558 per thousand cubic feet plus add-ons provided by the July 1, 1977 gas purchase contract, for its purchases from December 1, 1991 to the date of this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Steven M. Fetter
Chairman

(SEAL)

/s/ Ronald E. Russell
Commissioner

/s/ John L. O'Donnell
Commissioner

By its action of February 8, 1993.
/s/ Dorothy Wideman
Its Executive Secretary

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

AMENDMENT 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONTROL AND REGULATION

Act 9, 1929, p 21; imd eff March 19.

AN ACT to regulate corporations, associations or persons engaged in the business of carrying and transporting natural gas through pipe lines and to regulate the production, purchase and sale of natural gas; to provide for the control and regulation of such corporations, associations and persons by the Michigan public utilities commission; to define the powers and duties of the commission relative thereto; to prescribe penalties for the violations of the provisions hereof; and to repeal act number twenty-nine [29] of the public acts of eighteen hundred eighty-nine [1889].

The People of the State of Michigan enact:

§22.1311 Natural gas; buying, selling or transporting; law applicable.] Sec. 1. Every corporation, association or person, now or hereafter exercising or claiming the right to carry or transport natural gas by or through pipe line or lines, for hire, compensation or otherwise, or now or hereafter exercising or claiming the right to engage in the business of piping or transporting natural gas, or any other person or persons, now or hereafter engaging in the business of buying and selling or transporting natural gas within the limits of this state, shall not have or

possess the right to conduct or engage in said business or operations, in whole or in part, as above described, or have or possess the right to locate, maintain or operate the necessary pipe lines, fixtures and equipment thereto belonging, or use in connection therewith, concerning the said business of carrying or transporting natural gas as aforesaid, on, over, along, across, through, in or under any present or future highway, or part thereof, or elsewhere, within the state, or have or possess the right of eminent domain, or any other right or rights, concerning said business or operation, in whole or in part, except as authorized by and subject to the provisions of this act, except, further, and only such right or rights as may already exist which are valid, vested, and incapable of revocation by any law of this state or of the United States. (MCL §483.101; CL '29, §11632.)

§22.1312] Condemnation, use of highways; limitation to intrastate transportation. Sec. 2. For the purpose of acquiring necessary right-of-ways, every such corporation, association or person is hereby granted the right of condemnation by eminent domain, and the use of the highways in this state, for the purpose of transporting natural gas by pipe lines, and for locating, laying, constructing, maintaining and operating the same; and such condemnation proceedings shall be conducted in accordance with the procedure and in the same manner as is provided by the laws of this state of the condemnation of right-

of-ways by railroad companies: Provided, however, That no corporation, association or person shall be granted such right of condemnation by eminent domain or the right to use the highways of this state to lay or construct, maintain or operate a pipe line or lines for the transmission or transportation of natural gas unless and except such pipe line or lines are to be used solely and exclusively for the transmission, transportation and distribution of natural gas within the state of Michigan. (MCL §483.102; CL '29, §11633.)

§22.1313] Control vested in commission; private lines. Sec. 3. There is hereby granted to and vested in the Michigan public utilities commission, hereinafter styled the "commission," the power to control and regulate corporations, associations and persons engaged, directly or indirectly, in the business of purchasing or selling or transporting natural gas for public use; and said commission shall investigate any alleged neglect or violation of the laws of the state by any corporation, association or person purchasing or selling natural gas and transmitting or conveying the same by pipe line or lines for public use: Provided, That nothing in this act shall be construed to prevent oil and gas operators or producers of gas from laying pipe lines to transport or transmit gas to drilling wells within this state: And provided further, That factories or industries in this state may transport or transmit gas through pipe lines for their own use in plants located

wholly within this state without constituting themselves a common purchaser within the terms of this act. (MCL §483.103; CL '29, §11634.)

§22.1314] Common purchaser; definition; purchase without discrimination. Sec. 4. Every corporation, association or person, now or hereafter claiming or exercising the right to carry or transport natural gas by pipe line or lines, for hire, compensation, or otherwise, within the limits of this state, as owner, lessee, licensee, or by virtue of any other right or claim, or now engaged or hereafter engaging in the business of purchasing and selling natural gas shall be a common purchaser thereof, and shall purchase all the natural gas in the vicinity of, or which may be reasonably reached by its pipe lines, or gathering branches, without discrimination in favor of one producer or one person as against another, and shall fully perform all the duties of a common purchaser; but if it shall be unable to perform the same, or be legally excused from purchasing and transporting all the natural gas produced or offered, then it shall purchase and transport natural gas from each person or producer ratably, in proportion to the average production, and such common purchasers are hereby expressly prohibited from discriminating in price or amount for like grades of natural gas or facilities as between producers or persons; and in the event it is likewise a producer, it is hereby prohibited from discrimination in favor of its own

production, or production in which it may be interested directly or indirectly, in whole or in part, and its own production shall be treated as that of any other person or producer. (MCL §483.104; CL '29, §11635.)

§22.1315] Regulations of commission. Sec. 5. The commission is hereby empowered and it is made its duty to make regulations for the equitable purchasing, taking and collecting of all such gas, for the metering and delivery of the same and for providing adequate facilities for service demanded, which regulations shall apply to all persons affected thereby in like manner; and it shall have authority to relieve any such common purchaser, after due application, notice and hearing, from the obligation of purchasing gas of an inferior quality or grade or from purchasing gas from wells which for economic reasons are not at the time a practicable source of supply. (MCL §483.105; CL '29, §11636.)

§22.1316] Common carriers; preference prohibited. Sec. 6. All corporations, associations and persons, purchasing or collecting natural gas and transmitting or conveying the same for hire, compensation or otherwise by pipe line or lines as a common carrier shall be a common carrier thereof as at common law, and it shall be unlawful for any such common carrier doing business within this state to give, either directly or indirectly, any preference or advantage to any person, copartnership, corporation or locality, in any respect whatsoever as

to rates, service, facilities for service or commodity delivered. (MCL §483.106; CL '29, §11637.)

§22.1317] Maximum daily flow. Sec. 7. All corporations, associations and persons, whether producing or receiving gas from producers in any production field are hereby prohibited from taking more than twenty-five [25] per centum of the daily natural flow of any gas well or wells, unless, for good cause shown, under the exigencies of the particular case, the commission shall establish a higher or lower per centum under the prescribed rules and regulations thereof. (MCL§483.107; CL '29, 11638.)

§22.1318]. Curtailment of purchase; regulation by commission. Sec. 8. Whenever the full production from any common source or field of supply of natural gas in this state is in excess of the market demands, then any common purchaser of such natural gas as herein defined receiving production or output from such source or field shall take therefrom only such proportion of the available supply as may be marketed and utilized without waste, as the natural flow of the well or wells owned or controlled by such common purchaser bears to the total natural flow or production of such common source or field, having due regard to the acreage drained by each well, so as to prevent any common purchaser from securing an unfair proportion therefrom; and it shall be the duty of the commission and it is hereby empowered to regulate and enforce the

above provision, provided that the commission may by proper order permit the taking of a greater proportion by any common purchaser whenever or wherever it shall determine a taking of such greater proportion reasonable and equitable or conducive to public convenience or necessity. (MCL §483.108; CL '29, §11639.)

§22.1319] Map or plat of proposed line, filing with commission, approval; existing carriers. Sec. 9. Any corporation, association or person within the terms of this act desiring to construct transmission mains for the transportation or conveying of natural gas from its source to the locality or localities where utilized, shall submit to the commission, accompanied by due application, a map or plat of such proposed line or lines which it desires to construct, showing the dimensions and character of such proposed pipe line or lines, its compression stations, control valves, and connections, and shall first receive the approval of the commission of such map, route and type of construction before proceeding with the actual construction of such transmission lines, and it shall be the duty of the commission to examine and inquire into the necessity and practicability of such transmission line or lines and to determine that such line or lines will when constructed and in operation serve the convenience and necessities of the public before approval of such map and proposed transmission line or lines: Provided, That persons, associations or

corporations having already acquired the rights of common purchasers and common carriers at the time the provisions of this act became effective shall be required to file the map or plat provided for in this section only. (MCL §483.109; CL '29, §11640.)

§22.1320] Schedule of rates, filing with commission; alterations; application, approval, appeal.] Sec. 10. A common purchaser or common carrier of natural gas, before receiving the gas for transmission or delivery, shall file with the commission a schedule of the rates and price at which the common purchaser or common carrier will receive gas at delivery stations from a well, field, or source of supply, as well as the rates or charges at which the common purchaser or common carrier will deliver gas to connecting carriers or distributing lines or customers, and, if the common purchaser or common carrier is operating as a carrier for hire, the rates and charges which the common purchaser or common carrier will charge for the service to be performed by it. A common purchaser or common carrier operating as a carrier for hire also shall file a copy of each contract for purchasing, receiving, or supplying gas. The price to be paid and the rates and charges shall be stated and set up in the manner and form required by the commission and outlined in the rules of the commission for filing of rates of artificial gas utilities or pursuant to rules and conditions of service adopted by the commission, which the commission may make

for the regulation of common purchasers and common carriers of natural gas. Thereafter, a common purchaser or common carrier of natural gas may alter or amend its price paid, rates, charges, and conditions of service by application to and approval by the commission in the same manner and by the same process and under the same legal limitations and like right as are now provided by statute for the regulation by the commission of the rates for electricity transmitted in this state and process of appeal as provided in section 26 of Act No. 300 of the Public Acts of 1909, being section 462.26 of the Michigan Compiled Laws. (MCL §483.110.)

§22.1321] Sale and purchase contract filing. Sec. 11. Every common purchaser or common carrier of natural gas shall file with the commission a true and verified copy of the contract for the sale and purchase of gas entered into between the producer or producers and such common purchaser or common carrier, within thirty [30] days after the making thereof. (MCL §483.111; CL '29, §11642.)

§22.1322] Annual statement; contents. Sec. 12. Every common purchaser and common carrier of natural gas is hereby required to file with the commission on or before April first [1st] of each year, upon blanks to be prescribed and furnished by the commission, an annual statement of its income, expenses, operating and corporate accounts for the preceding calendar year, including the state of its finances in

capital securities, fixed capital and other related corporate or balance sheet accounts and including also statistical data relating to the production, purchase, transmission and sales of gas by such common purchasers and common carriers of natural gas, its equipment facilities and customers, said statement to be verified by the oath of some officer of the utility knowing the facts stated therein. (MCL §483.112; CL '29, §11643.)

§22.1323] Accounts and records. Sec. 13. The commission shall have the power and authority and it is hereby made its duty to prescribe the manner and the form or system of accounts, financial records and operating memoranda or data to be set up and kept by all common purchasers and common carriers of natural gas and every common purchaser and common carrier of natural gas existing and operating with this state is hereby required to set up and keep its books of accounts, records and memoranda in the manner and form prescribed by the commission. (MCL §483.113; CL '29, §11644.)

§22.1324] Prevention of waste; rules of commission. Sec. 14. The commission shall have authority to prevent the waste of natural gas in producing operations and in the piping and distribution thereof and to make rules and regulations for that purpose. It is hereby authorized and empowered to do all things necessary for the conservation of natural gas in connection

with the production, piping and distribution thereof and to establish such other rules and regulations as will be necessary to carry into effect this act, to conserve the natural gas resources of the state and to preserve the public peace, safety, and convenience in relation thereto. (MCL §483.114; CL '29, §11645.)

§22.1325] Penalties; civil liability. Sec. 15. Any corporation, association or person, violating any provision of this act or any order or regulation of the commission made pursuant thereto, shall be deemed guilty of an unlawful act and shall be liable to a penalty of not less then one hundred [100] dollars, nor more than twenty thousand [20,000] dollars. Any officer, agent, representative, employee or servant of any corporation or association or any person who causes, aids or assists, or participates in any such unlawful act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a fine of not less than one hundred [100] dollars, nor more than one thousand [1,000] dollars, or to imprisonment in the county jail not less than thirty [30] days, nor more than one [1] year, or to both such fine and imprisonment in the discretion of the court. Said penalty shall be exclusive of civil liability. (MCL §483.115; CL '29, §11646.)

§22.1326] Assistants; employment by commission. Sec. 16. The commission is hereby authorized and empowered to employ

such clerks, inspectors, and experts as may be necessary to carry out and administer the provisions of this act. (MCL §483.116; CL '29, §11647.)

22.1327] Municipal corporation excepted. Sec. 17. Nothing in this act contained shall be construed to vest the commission with regulatory control and authority over any natural gas utility owned and operated by a municipal corporation nor to in any way infringe upon the authority of the duly constituted official bodies having charge of such municipally owned utilities. (MCL 483.117; CL '29, §11648.)

§§22.1328, 22.1329] (Repealed by Pub Acts 1945, No. 267, imd eff May 25. These sections contained a severing clause and a repeal provision.)

§22.1330] Immediate effect. Sec. 20. An emergency is hereby declared, by reason whereof it is necessary for the immediate preservation of the public peace, safety, convenience and welfare that this act take immediate effect. (MCL §483.120; CL '29, §11651.)

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:...

> (c) a state court or a United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Law Offices of
J. ANDREW DOMAGALSKI
Village Professional Building
8992 East 'D' Avenue · P.O. Box 366
Richland, Michigan 49083

J. Andrew Domagalski
William E. Tapovatz
Jeffrey D. VanLeuwen

Telephone
Area 616·629·9791
Area 616·629·4933

August 7, 1989

Consumers Power Company
1945 West Parnall Road
Jackson, MI 49201

Attn: Mr. Michael J. Ryan
Gas Acquisition Director

Re: MPSC Case Nos. U-8287, U-8287-R, U-8546, U-8546-R, U-8867, U-8867-R, U-9095, U-9173 and U-9222

Gentlemen:

Enclosed please find a Settlement Agreement that relates to the captioned proceedings which has been executed by North Michigan Land and Oil Company, et al. ("North Michigan"), a party to those proceedings.

Please be advised that the undersigned represents North Michigan in the captioned matters and that the execution by it of the enclosed Settlement

Agreement is expressly conditioned upon the following:

1. Within 45 days after the date on which the Michigan Public Service Commission ("MPSC") approves the enclosed Settlement Agreement, Consumers Power Company ("Consumers") shall pay North Michigan the sum of Six Hundred Eighty Two Thousand Seven Hundred Ninety Seven and 47/100 Dollars ($682.797.47) which sum includes interest through May 31, 1989.

2. Within 10 days after the payment of the sum set forth in Paragraph 1 hereof, Consumers shall pay to North Michigan the balance of the interest that has accrued to North Michigan on said sum for the period of time specified below in the Escrow Account heretofore established by Consumers in connection with the captioned cases at the Comerica Bank, Jackson, Michigan. The period of time referred to above shall begin on June 1, 1989 and end on the fifteenth (15th) day immediately preceding the date on which Consumers makes the interest payment referred to in this Paragraph 2.

3. Consumers shall indemnify and defend North Michigan from and against any claims or liability for the royalty referred to in Paragraph F of the enclosed Settlement Agreement provided that North Michigan complies with the provisions of that Paragraph.

4. Consumers shall pay all severance taxes required to be paid by Consumers under and pursuant to the Gas Purchase Contract heretofore entered into between Consumers and North Michigan and to which this Settlement Agreement relates.

5. Within sixty (60) days after the date hereof, Consumers shall reimburse North Michigan for all unreimbursed compressor costs, if any, incurred by North Michigan in selling gas to Consumers under the Gas Purchase Contract hereinabove referred to, if such reimbursement is provided for under such Contract.

6. Consumers will waive its reimbursement claim against North Michigan under the terms of the Settlement Agreement insofar as that claim pertains

to the Gas Purchase Contract referred to herein and gas received thereunder during the calendar years 1986 and 1987.

7. The term of the Gas Purchase Contract referred to above shall be extended to November 1, 1995.

8. The price provided to be paid for gas sold and purchased under the aforesaid Gas Purchase Contract for the years 1989, 1990 and 1991 (through November 30) will be $3.050/Mcf, $3.294/Mcf, and $3.558/Mcf, respectively, plus Btu and other adjustments and payments as are necessary to accomplish the purpose and intent of this Paragraph 8 with respect to any amounts due and owing to North Michigan hereunder for gas sold by it under the above Gas Purchase Contract from and after January 1, 1989.

9. The price to be paid to North Michigan by Consumers for gas sold and purchased under the referenced Gas Purchase Contract from and after December 1, 1991 shall be as set forth in that Contract.

10. Both parties recognize that the sum set forth in Paragraph 1 hereof includes an amount which reflects the recomputation of the 1988 price under the aforesaid Gas Purchase Contract consistent with Paragraph L of the enclosed Settlement Agreement assuming, however, 960 Btu per cubic foot.

11. Consumers' obligation under the foregoing provisions hereof and under the enclosed Settlement Agreement are contingent upon MPSC approval of that Settlement Agreement and similar Settlement Agreements with all intervening producers in MPSC Case Nos. U-8287, U-8546, U-8867, and U-9173; provided, however, that in the event such approval is not obtained within four (4) months from the date hereof, the enclosed Settlement Agreement shall be null and void and all rights and obligations thereunder and under the terms and provisions hereof shall terminate.

12. In the event of a conflict between the provisions of this letter and the enclosed Settlement Agreement, the

provisions of this letter shall govern.

If the foregoing meets with your understanding of the matters covered thereby, please indicate your acceptance thereof in the space provided below; whereupon this letter and your acceptance subscribed hereto shall constitute a valid and enforceable agreement between North Michigan and Consumers, their successors and assigns.

Very truly yours,

s/ J. Andrew Domagalski

Accepted and Agreed Upon
This 7th day of August, 1989.

CONSUMERS POWER COMPANY

By: s/ Michael J. Ryan
Its: Gas Acquisition Director

Appendix "I"

Court of Appeals, State of Michigan

ORDER

NORTH MICHIGAN LAND OIL CORP. v MPSC

Docket # 162164; 162190; 162191

L.C. #00010029

E. Thomas Fitzgerald
Presiding Judge

Marilyn Kelly
George N. Bashara, Jr.

Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on Aug. 29, 1995

SEAL:
State of Michigan
Court of Appeals

s/Ella Williams

R 460.17501 Complaints; limited matters; initiating complaint.

Rule 501. A complaint shall be limited to matters involving alleged unjust inaccurate or improper rates or charges or unlawful or unreasonable acts, practices, or omissions of a utility or motor carrier, including a violation of any commission rule, regulation, or order, including a tariff filed or published by a utility or motor carrier, or a violation of a statute administered or enforced by the commission. A complaint may be either formal or informal and may be made by a person having an interest in the subject matter of the complaint or may be made by the commission on its own motion or by the staff, subject to applicable statutory standards.

Supreme Court, U.S.
FILED
OCT 23 1996
CLERK

(2)

No. 96-451

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORTH MICHIGAN LAND & OIL CORPORATION, *et al.*,
Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the State of Michigan Court of Appeals

---

BRIEF OF RESPONDENT CONSUMERS POWER COMPANY IN OPPOSITION

DAVID A. MIKELONIS
JON R. ROBINSON
FRANK R. KNOX
FRANCIS X. BERKEMEIER
CONSUMERS POWER COMPANY
212 W. Michigan Avenue
Jackson, Michigan 49201
(517) 788-0550

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent Consumers Power Company

* Counsel of Record

October 23, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

QUESTION PRESENTED

Whether the Michigan Public Service Commission's decision to exercise jurisdiction over a gas purchase contract between gas producers and a public utility and to declare the price term of the contract to be not "just and reasonable" violated any of petitioners' constitutional rights.

LIST OF PARTIES AND AFFILIATES

All of the parties to this proceeding are listed on the cover of the petition.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Consumers Power Company states that it is a wholly owned subsidiary of CMS Energy Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND AFFILIATES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Antrim Resources v. *Public Serv. Comm'n*, 446 N.W.2d 515 (Mich. Ct. App. 1989)	5, 6
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 (1952)	7
City of New Orleans v. *Dukes*, 427 U.S. 297 (1976)	5
Coyle v. *Smith*, 221 U.S. 559 (1911)	6
Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983)	6
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944)	7
North Michigan Land & Oil Corp. v. *Consumers Power Co.*, No. 93-1705 (6th Cir. Aug. 26, 1996)	3
In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	7
United States v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-451

NORTH MICHIGAN LAND & OIL CORPORATION, *et al.*,
Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the State of Michigan Court of Appeals

---

BRIEF OF RESPONDENT CONSUMERS POWER COMPANY IN OPPOSITION

Respondent Consumers Power Company hereby opposes the petition for certiorari in this case.

STATEMENT OF THE CASE

1. Petitioners are natural gas producers in Michigan that supply gas to respondent pursuant to a contract dated July 1, 1977. Because of the price escalation provision in that agreement and the steadily dropping market price of natural gas, the cost to respondent of gas purchased from petitioners during the 1980s grossly exceeded the cost of alternative supplies. In 1987, the Michigan Public Service Commission ruled that respondent could not pass through to its consumers the full cost of natural gas purchased from petitioners under the 1977 agreement. In so doing, the Michigan Public Service Commission

specifically questioned respondent's prudence in failing to invoke the Commission's jurisdiction over intrastate gas sales to respondent pursuant to Act 9, Mich. Comp. Laws Ann. § 483.101 *et seq.* ("Act 9").

In 1988, respondent filed applications with the Michigan Public Service Commission ("PSC") asking it to exercise its jurisdiction to regulate intrastate gas contract prices pursuant to Act 9. Prior to the Commission ruling on those applications, respondent entered into agreements in 1989 to settle the dispute before the Commission concerning the cost of intrastate natural gas that respondent was purchasing. First, respondent settled with a group of its producers, including petitioners, to set a lower price for the period from 1986 through November 1991. Among other things, this general settlement agreement, which was approved by the Commission, provided that all parties reserved the right to contest any intrastate price or cost payable on December 1, 1991 or thereafter. Second, respondent entered into a separate Letter Agreement dated August 7, 1989, in which respondent agreed that after November 1991, it would purchase gas from petitioners under the terms of the original 1977 contract. This latter agreement was not submitted to the PSC for its review until the filing of the application which initiated this action.

2. On November 27, 1991, respondent filed an application with the Michigan Public Service Commission under Act 9 seeking a declaration that the price increase embodied in the August 1989 Letter Agreement was unjust and unreasonable, and asking the Commission to establish a just and reasonable price. Petitioners intervened and interposed a series of objections, including raising the constitutional issues presented to this Court.[1]

---

[1] Petitioners have been quite litigious in this dispute. Not only have they pursued the issue all the way to this Court, but previously they filed suit in the United States District Court for the Eastern

After an extensive hearing, the Commission held that the price adjustment in the August 1989 Letter Agreement was subject to "just and reasonable" review pursuant to Section 10 of Act 9. The Commission further concluded that the price was unjust and unreasonable and set a ceiling price for gas sold pursuant to the 1977 contract. The Commission declined respondent's request to make the new price effective from the November 1991 date of the application, and the price change therefore became effective from the February 8, 1993 date of the Commission's order.

Petitioners raised the various constitutional issues they present here, but argued that the Commission lacked jurisdiction to consider them. The Commission did not disagree with the petitioners' suggestion, but nevertheless opined that its review of the reasonableness of the prices charged to a utility was constitutionally permissible. Pet. App. 57a-60a.

On appeal, the Michigan Court of Appeals affirmed the Commission. It held that the Commission has the authority to review the cost of natural gas sold to respondent and that the decision ordering the prices lowered to a

---

District of Michigan raising many of the same issues they presented through the state court's review of the PSC's decision. That court abstained and the Sixth Circuit affirmed by unpublished order. *North Michigan Land & Oil Corp.* v. *Consumers Power Co.*, No. 93-1705 (6th Cir. Aug. 26, 1994).

In addition, petitioners have filed several other state law actions related to this dispute. In two separate actions commenced in different state circuit courts, petitioners (and another producer aligned with petitioner before the Commission) sought to raise essentially the same issues as were raised before the Commission. Those actions were dismissed by the circuit courts. *See* Grand Traverse County Circuit Court No. 95-13217-CK and Jackson County Circuit Court No. 95-72356-CK. The producers appealed those dismissals to the Michigan Court of Appeals, which consolidated the two appeals. *See* Court of Appeals Nos. 188362 and 188769. That court has yet to act on this set of appeals.

just and reasonable level was constitutionally permissible. The court of appeals denied rehearing on August 29, 1995 and the Michigan Supreme Court denied leave to appeal on June 28, 1996.

REASONS FOR DENYING THE PETITION

Petitioners struggle mightily to convert this run-of-the-mill state regulatory proceeding into a case of constitutional dimension. But their effort falls woefully short because there is no substantial federal constitutional question posed by regulatory review of the price that natural gas is sold to a public utility. Petitioners assert numerous constitutional violations, but for the reasons that follow, none poses any kind of serious challenge to the validity of the decisions below. Accordingly, the Court should deny the petition.

1. Petitioners argue (Pet. 12) that Act 9 violates the Equal Protection Clause because it grants respondent a right to petition the PSC to reduce contract costs, but provides no corresponding right to producers to seek an increase in the price at which they sell natural gas to a utility. The court of appeals rejected this argument factually by holding that state law does permit producers to seek an increase. Pet. App. 25a (citing *Sullivan* v. *PSC*, 287 N.W.2d 188 (Mich. Ct. App. 1979)).

Undaunted by this setback to the premise of their constitutional argument, petitioners then assert vigorously (Pet. 12-13) that the court of appeals' interpretation of state law is wrong. That, however, is strictly a question of state law and not a question this Court can entertain. Accordingly, because the predicate assumption of disparate treatment under state law is inaccurate, there is no colorable equal protection problem here.

Of course, even if Michigan conferred a right on public utilities that it did not grant to producers, that would not remotely raise a serious equal protection issue. This

is classic economic regulation, which is subject to rational basis scrutiny. See, *e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-06 (1976). It is surely rational to conclude that the State has a greater interest in protecting the well being of public utilities whose mission is to serve the public interest than of private natural gas producers whose economic conduct is largely unregulated.[2]

Even if the legal issue were much stronger, there is no indication that this scheme of regulation operates anywhere outside of Michigan, which makes the issue of extremely limited importance. In sum, the issue is not worthy of this Court's review.

2. Petitioners argue (Pet. 16-17) that the PSC's regulation of the cost term in their contracts constitutes an "impairment of contract" in violation of the Contract Clause of Article I, Section 10 of the Constitution. The court of appeals rejected this argument following the reasoning in its previous decision in *Antrim Resources* v. *Public Service Commission*, 446 N.W.2d 515 (Mich. Ct. App. 1989), that the statute granting the Commission the authority to regulate the price term in contracts with utilities predated by more than 50 years the parties' decision to enter their contract in August 1989 to modify the price term. Thus, the contract was entered into subject to the statutory oversight of the PSC. Therefore, the

---

[2] Petitioners assert (Pet. 15) that no "public purpose" is served by regulating the price at which gas is sold to respondent because the public is protected by the Commission's ability to refuse to allow unreasonably high costs to be passed through to consumers. But this ignores that protecting ultimate consumers is not the only objective of Act 9. It also is designed to "control and regulate corporations . . . engaged in the business of purchasing or selling or transporting natural gas for public use." *Antrim Resources* v. *Public Serv. Comm'n*, 446 N.W.2d 515, 518 (Mich. Ct. App. 1989). It cannot be gainsaid that escalating costs can jeopardize the viability of an entity, like respondent, that serves the public interest. Protecting against that event is more than enough "public purpose" to satisfy the minimal demands of equal protection.

refusal of the PSC to give approval of a contract term it found to be unjust and unreasonable in no way impaired this contract. Pet. App. 27a; *Antrim Resources*, 446 N.W.2d at 520-21 (citing *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-30 (1934)).

Petitioners' answer is that an agency's or court's interpretation of a statute can violate the Contract Clause. It is difficult to understand how that argument establishes any impairment of petitioners' contract. The statute still makes the contract subject to PSC approval; refusal to approve is thus a completely reasonable and foreseeable consequence of the agreement, not an impairment of that agreement. Accordingly, the constitutionality of the Michigan law as applied by the PSC is much stronger than the actions upheld by this Court in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983).

3. Petitioners challenge (Pet. 18) the statute on due process grounds on the basis that there are no standards with respect to the Commission's power to approve a price change. In the first place, this argument really poses more of an excessive "delegation" of legislative authority to an administrative agency issue than a due process concern. Of course, as a delegation problem it implicates solely matters of state law.[3] But even viewed as a due process issue, the argument simply ignores the state court's decision that the PSC must apply a "just and reasonable"

---

[3] Petitioners purport to raise (Pet. 19-21) "separation of powers" issues, but they plainly do not involve any questions of federal law. Michigan is free to structure its separate branches of government as it sees fit. There is no federal constitutional restriction on how a state legislature delegates either legislative or judicial functions to administrative agencies. If Michigan does not follow the federal model that is of no concern to this Court. Indeed, arguably the Tenth Amendment protects Michigan's right to order its own internal affairs without interference by the federal government. *Cf. Coyle* v. *Smith*, 221 U.S. 559, 565 (1911) (federal government cannot dictate location of state capitol).

standard that is based primarily on the market price of gas. Pet. App. 21a-22a (citing *Antrim Resources, supra*). Certainly, that standard, which is embodied in virtually every federal delegation of power to an administrative agency, raises no serious due process objection. See *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) ("just and reasonable" is not too vague); *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963) ("unreasonably low price" not too vague); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952) ("so far as practicable" not vague).

4. Finally, petitioners raise two additional procedural due process issues. First, they complain that the court of appeals did not dwell at length on their constitutional issues. Of course, there are two reasons for this: 1) the issues warrant only a perfunctory answer because they are not substantial and 2) at least some of the issues already were disposed of by the court in a written opinion in *Antrim Resources*. In any event, the issues were squarely addressed *de novo* by the court of appeals and that is all the process that any litigant is due.

Second, they complain (Pet. 23-24) that the overall standard of judicial review of PSC orders is unduly narrow. To the extent the argument is aimed at petitioners' constitutional issues, it is manifestly wrong. The court of appeals reviewed those issues *de novo*. To the extent the argument criticizes the scope of judicial review of an agency's factfinding, it surely raises no question of federal constitutional law. Judicial review that is deferential to an administrative decision still satisfies due process, absent evidence of official bad faith or misconduct. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (agency decisions supported by heavy presumption of validity on judicial review). The PSC certainly accorded petitioners ample opportunity to present their case and examined the matter at length. Judicial scrutiny

to ensure that all the bases were touched by the agency is normal and certainly constitutional.

* * * *

Petitioners' efforts to dress their case in constitutional garb ultimately must fail. It is plain that this case involves nothing more than a naked set of state law issues that were exclusively the province of the court below, were properly decided by that court, and do not warrant further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. MIKELONIS
JON R. ROBINSON
FRANK R. KNOX
FRANCIS X. BERKEMEIER
CONSUMERS POWER COMPANY
212 W. Michigan Avenue
Jackson, Michigan 49201
(517) 788-0550

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent Consumers Power Company

October 23, 1996

* Counsel of Record

No. 96-451

(3)

Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

In The

SUPREME COURT of the United States

October Term, 1996

NORTH MICHIGAN LAND & OIL CORPORATION; NIELSON ENTERPRISES CORPORATION; NIELSON ENTERPRISES, a Limited Partnership; NORTH MICHIGAN GAS & OIL, a Limited Partnership; DAVID E. NIELSON; DALE M. NIELSON; GERALD J. TALBOT; and CMK ENTERPRISES, INC.,

Petitioners,

vs.

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS POWER COMPANY, and FRANK J. KELLY, as Attorney General for the State of Michigan.

Respondents.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

PETITIONERS' REPLY BRIEF

J. ANDREW DOMAGALSKI
JEFFREY D. VANLEUWEN
Attorneys for Petitioners
8992 East D Ave., Box 366
Richland, MI 49083
(616) 629-9791

and

BYRON P. GALLAGHER
Attorney for Petitioners
555 N. Main St., Box 446
Mt. Pleasant, MI 48858
(517) 773-9961

11 pp

QUESTION PRESENTED FOR REVIEW

Whether Respondent, the Michigan Public Service Commission ("MPSC"), and the Michigan Court of Appeals, erred in determining that granting the relief requested by Respondent, Consumers Power Company ("Consumers") in MPSC Case No. U-10029 would not violate the constitutional rights of Appellants and that Section 10 of 1929 PA 9 ("Act 9") [MCLA §483.110; MSA §22.1320] is not unconstitutional, either on its face or as applied by the MPSC and Michigan Court of Appeals.

PARTIES TO THE PROCEEDING

The caption of the case contained on the cover sheet to this Reply Brief contains the name of all parties to the proceedings in this Court. There are no parent companies or non-wholly owned subsidiaries of corporate Petitioners, North Michigan Land & Oil Corporation, Nielson Enterprises Corporation, or CMK Enterprises, Inc.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv

TABLE OF AUTHORITIES
(cases, etc.)

Page

Cases

City of New Orleans v Dukes,
427 US 297, 303-06 (1976) 4

North Michigan Land & Oil Corporation v
MPSC, 211 Mich App 424; 536 NW 2d 259
(1995) 1

Statutes and Court Rules

28 USC §1257(a) 1, 2

1929 PA 9 ("Act 9") [MCLA §483.101,
et seq.; MSA §22.1311, et seq.] 2

MCLA §460.6h, et seq.;
MSA §22.13(6h), et seq. 5

SCR 10(c) 2

Section 10 of 1929 PA 9 ("Act 9")
[MCLA §483.110; MSA §22.1320] . . i, 4, 5

Section 11 of Act 9
[MCLA §483.111; MSA §22.1321] 3

Section 15 of Act 9
[MCLA §483.115; MSA §22.1325] 3

PETITIONER' REPLY BRIEF

North Michigan Land & Oil Corporation, et al. filed a Petition For Writ Of Certiorari to review the Order of the Michigan Supreme Court denying Petitioners' Application For Leave To Appeal from an Opinion of the Michigan Court of Appeals and an Opinion and Order of the MPSC, which are contained verbatim as Appendix "A", "B" and "C" in the Appendix to the Petition For Writ Of Certiorari.

OPINIONS BELOW

The Order of the Michigan Supreme Court (Appendix "A" to Petition For Writ Of Certiorari) is unreported. The Opinion of the Michigan Court of Appeals (Appendix "B" to Petition For Writ Of Certiorari) is reported at 211 Mich App 424; 536 NW 2d 259 (1995). The Opinion and Order of the MPSC (Appendix "C" to Petition For Writ Of Certiorari) is unreported.

STATEMENT OF JURISDICTION

The Order of the Michigan Supreme Court (Appendix "A" to Petition For Writ Of Certiorari) was entered on June 28, 1996.

The jurisdiction of this Court is invoked pursuant to 28 USC §1257(a). That statutory provision was set forth verbatim in Appendix "D" to the previously filed Petition For Writ Of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, RULES AND REGULATIONS INVOLVED.

U.S. Constitution, Fourteenth Amendment, Section 1 (Appendix "E" to Petition For Writ Of Certiorari); 28 USC §1257(a) (Appendix "B" to Petition For Writ Of Certiorari); 1929 PA 9 ("Act 9") [MCLA §483.101, et seq.; MSA §22.1311, et seq.] (Appendix "F" to Petition For Writ Of Certiorari); and SCR 10(c) (Appendix "G" to Petition For Writ Of Certiorari).

STATEMENT OF THE CASE

The Statement of the Case set forth at pages 2 through 11 of the Petition For Writ Of Certiorari is incorporated herein by reference.

REASONS FOR GRANTING THE WRIT

The reasons for granting the Writ Of Certiorari are set forth at pages 11-25 of the Petition For Writ Of Certiorari, and are incorporated herein by reference. In the following argument, Petitioners address certain points raised in the Opposition Brief filed by Respondent Consumers.

I

CERTAIN ARGUMENTS IN CONSUMERS' OPPOSITION BRIEF ARE ERRONEOUS AND/OR MISLEADING

(A) At page 2 of its Opposition Brief, Respondent Consumers notes that the August 7, 1989 Letter Agreement entered into between the parties (Appendix "H" to Petition For Writ of

Certiorari) "was not submitted to the PSC for its review until the filing of the Application which initiated this action." However, Consumers neglects to point out that Section 11 of Act 9 [MCLA §483.111; MSA §22.1321] required Consumers to file with the MPSC a true and verified copy of that Letter Agreement within thirty (30) days after the making thereof. Consumers also neglects to point out that it did not comply with the 30-day filing requirement contained in Section 11 of Act 9, also failing to point out that, as a result of such non-compliance, Consumers was deemed to have committed an unlawful act under Section 15 of Act 9 [MCLA §483.115; MSA §22.1325], thereby rendering it liable for civil and criminal penalties.

Consumers further fails to point out that it was Consumers' own failure to file the August 7, 1989 Letter Agreement with the MPSC which was the basis of the MPSC's ruling that it did not have to give that Letter Agreement any legal effect. In other words, Consumers, by virtue of its own criminal wrongdoing in failing to file the Letter Agreement as required under the above mentioned provisions of Act 9, benefitted to the tune of millions and millions of dollars, at Petitioners' expense.[1] Of course,

---

[1]As noted in the Petition For Certiorari previously filed herein, Act 9 does not grant producers a corresponding right to file an Amendment to a Gas Purchase Contract with the MPSC and seek MPSC approval thereof. Only the common purchaser may do so, and Consumers admittedly failed to do so in this case.

that fact was totally ignored by both the MPSC and Michigan Court of Appeals in their decisions below.

(B) Consumers also fails to point out that when Consumers filed its Application in MPSC Case No. U-10029, it did not seek approval of the full price provided to be paid under the Letter Agreement but, instead, sought disapproval of that price. This is acknowledged by Consumers at the bottom of page 2 of its Brief, wherein it admits that it filed an Application with the MPSC in Case No. U-10029 seeking a determination that the price increase provided for in the August 7, 1989 Letter Agreement was "unjust and unreasonable" and seeking Commission establishment of a just and reasonable price. After reaping all of the benefits of the settlement which was entered into in the summer of 1989, Consumers then sought to obtain MPSC disapproval of the very price which had induced Petitioners to enter into the settlement in the first instance and, as previously noted, the MPSC's decision to grant Consumers the relief it requested was based on Consumers' own, admitted criminal wrongdoing in failing to file the Letter Agreement and seek MPSC approval thereof.

(C) At pages 4 and 5 of its Brief, Consumers argues that, even if Section 10 of Act 9 confers a right on Consumers which it did not grant to producers, that would not remotely raise a serious equal protection issue because, since we are dealing with classic economic regulation, it is subject to rational basis scrutiny, citing City of New Orleans v Dukes, 427 US 297, 303-06 (1976). Consumers argues

that it is surely rational to conclude that the state has a greater interest in protecting the well being of public utilities whose mission is to serve the public interest than of private natural gas producers whose economic conduct is largely unregulated. This argument is erroneous, for the reasons discussed below.

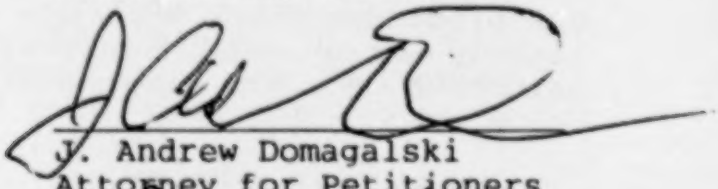
There is no "public purpose" to be served by the classification in Section 10 of Act 9 which allows a common purchaser such as Consumers to seek a gas purchase contract price decrease while not affording the gas producer a corresponding right to seek a price increase. On page 5 of its Opposition Brief, Consumers advances as the "public purpose" the protection of the well being of public utilities whose mission is to serve the public interest. This argument is misleading. The public, as well as Consumers, is protected by the Michigan Gas Cost Recovery statute [MCLA §460.6h, et seq.; MSA §22.13(6h), et seq.]. Consumers is protected because it obtains approval from the MPSC to pass along reasonable and prudent gas costs to its customers. The public is protected because, if there are any "unreasonable" gas costs, those are disallowed and may not be passed through to the public but must, instead, be borne either by Consumers' profits or its shareholders.

CONCLUSION

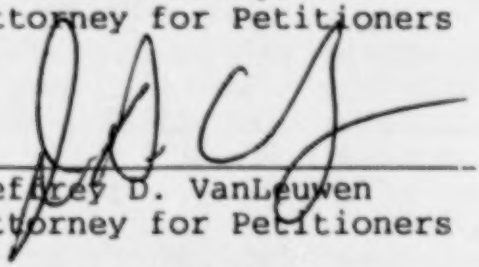
For the foregoing reasons and those set forth in the Petition For A Writ Of Certiorari previously filed herein, Petitioners respectfully request that

their Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

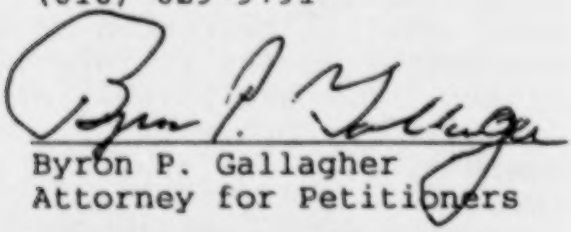


J. Andrew Domagalski
Attorney for Petitioners



Jeffrey D. VanLeuwen
Attorney for Petitioners

BUSINESS ADDRESS:
8992 East D Avenue
P.O. Box 366
Richland, MI 49083
(616) 629-9791



Byron P. Gallagher
Attorney for Petitioners

BUSINESS ADDRESS:
555 North Main Street
P.O. Box 446
Mt. Pleasant, MI 48858
(517) 773-9961